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(24,858)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

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**No. 574.**

THE BEAVER RIVER POWER COMPANY, APPELLANT,

*vs.*

THE UNITED STATES.

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**No. 575.**

THE UNITED STATES, APPELLANT,

*vs.*

THE BEAVER RIVER POWER COMPANY.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF UTAH.

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1 UNITED STATES OF AMERICA,  
*District of Utah, ss:*

At a Regular Term of the United States District Court for the District of Utah, Begun and Held in the Building used as a United States Court-house, in the City of Salt Lake, in said District, on the Second Monday, Being the 12th Day of April, A. D. 1915, and of the Independence of the United States of America the 139th Year.

Present: Honorable John A. Marshall, United States District Judge for the District of Utah.

On the 25th day of October, 1912, the complainant filed its bill of complaint in said court, being in the words and figures following, to-wit:—

In the District Court of the United States in and for the District of Utah, Central Division.

In Equity. No. 399.

UNITED STATES OF AMERICA, Plaintiff,  
vs.

THE BEAVER RIVER POWER COMPANY, a Corporation, Defendant.

2 To the Judge of the United States District Court within and for the District of Utah:

The United States of America, by the Attorney-General, brings this Bill of Complaint against the Beaver River Power Company, a corporation, and thereupon avers and alleges as follows, to-wit:

I.

The defendant is a corporation organized and existing under the laws of the State of Colorado, for the lucrative purposes of producing and supplying electrical energy to all who may desire to obtain it and who are able and willing to pay the defendant such pecuniary charges as it may choose to exact in return; that said defendant has its office and principal place of business in the City of Provo, in the State and District of Utah.

II.

That for a number of years, past, to-wit, since on or about the first day of April, A. D. 1908, said defendant has been engaged, and is now engaged, in the continuous operation of certain hydro-electric power works, situated near the town of Beaver, in Beaver County, State of Utah, and upon certain tracts of land hereinafter more particularly described.

The chief and essential elements composing the said works are: a Power House, a Reservoir, Pipe Lines or conduits, Telephone Lines, Transmission Lines, and certain buildings and other structures, all of which are herein more specifically described; that said hydro-electric power works are equipped with various water motors, electric generators, and other machinery and apparatus whereby the kinetic energy acquired by the water in its descent through said conduits

or pipe lines may be transmuted into electrical energy; that  
 3 said power house, pipe lines or conduits, transmission lines, reservoir, telephone lines, and certain buildings and other structures belonging to the defendant company, hereinafter more particularly described, are situated wholly upon and within the land of the plaintiff, except a portion of said transmission lines hereinafter described, which land, together with much other land of the plaintiff, was set apart and reserved for National Forest purposes on August 20, 1902, and which by later Proclamation issued by the President of the United States of America dated January 24, 1906, (appearing in Volume 34, Part 3, of the U. S. Statutes at Large, page 3189), and April 25, 1907 (appearing in Volume 35, Part 2, of the U. S. Statutes at Large, page 2182), respectively, became a part of the Beaver National Forest, the name of which forest, by Executive order of the President of the United States of America, dated June 18, 1908, was changed to that of the Fillmore National Forest, and said land has ever since remained and is now a part of the said Fillmore National Forest.

That the said power house, consisting of a stone building, 44 by 70 feet; a blacksmith shop 14 by 16 feet; a stable 16 by 32 feet, with a wagon shed attached; a manager's house and office 31 by 39 feet; an ice house 12 by 14 feet; a workshop 29 by 55 feet and other structures, all of which, except said power house, are hereinafter referred to as "various other structures and buildings" are located in and situated upon the land of the plaintiff within the said Fillmore National Forest in the southeast quarter ( $\frac{1}{4}$ ) of Section twenty-four (24), Township twenty-nine (29) South, Range six (6) West, Salt Lake Base and Meridian; that the said reservoir, or reservoir site, is located in and situated upon the land of the plaintiff within the

said Fillmore National Forest in the west half ( $\frac{1}{2}$ ) of Section  
 4 two (2), and the east half ( $\frac{1}{2}$ ) of Section three (3), all in Township thirty (30) South, Range five (5) West, Salt Lake Base and Meridian; that the said pipe lines or conduits are located in and situated upon land of the plaintiff within the said Fillmore National Forest, as follows:

First. A conduit located in the West half ( $\frac{1}{2}$ ) of Section seven-teen (17); south-east quarter ( $\frac{1}{4}$ ) of Section eighteen (18), the east half ( $\frac{1}{2}$ ) and Lots fourteen (14), Fifteen (15) and Sixteen (16) of Section Nineteen (19); Lots five (5) and six (6), in Section thirty (30) all in Township twenty-nine (29) South, Range five (5) west, Salt Lake Base and Meridian; and in the south-east quarter ( $\frac{1}{4}$ ) of Section twenty-four (24), Township twenty-nine (29) south, Range six (6) West, Salt Lake Base and Meridian, having a total length of 16,085 feet; composed of 3,863 feet of 34

inch steel pipe; 3,863 feet of 32 inch steel pipe; 3,863 feet of 30 inch steel pipe; 2,834 feet of 28 inch steel pipe; 472 feet of 26 inch steel pipe; 630 feet of 24 inch steel pipe; 222 feet of 22 inch steel pipe, and 338 feet of 20 inch steel pipe.

Second. The East Fork Pipe line or conduit, located in the south-west quarter ( $\frac{1}{4}$ ) of Section seventeen (17), Township twenty-nine (29) South, Range five (5) west, Salt Lake Base and Meridian, having a total length of 1,140 feet and constructed of 12 inch steel pipe.

Third. The Dry Hollow Pipe Line or conduit, located in the north-east quarter ( $\frac{1}{4}$ ) of Section thirty (30), and the southeast quarter ( $\frac{1}{4}$ ) of Lot sixteen (16) in Section nineteen (19), Township twenty-nine (29) South, Range five (5) west, Salt Lake Base and Meridian, having a total length of 1,225 feet and constructed of 12 inch steel pipe.

5 Four. The South Fork Pipe Line or conduit, located in Lots six (6), nine (9), eleven (11), twelve (12), and sixteen (16), and the south-east quarter ( $\frac{1}{4}$ ) of Section thirty (30), the north-east quarter ( $\frac{1}{4}$ ) of Section thirty-one (31) and the north-west quarter ( $\frac{1}{4}$ ) of Section thirty-two (32), Township twenty-nine (29) south, Range five (5) west, Salt Lake Base and Meridian, 4,518 feet of which is constructed of 16 inch steel pipe, 4,517 feet of which is constructed of 14 inch steel pipe, and 341 feet of which is open ditch.

Fifth. The Spring Conduit, located in the south-east quarter ( $\frac{1}{4}$ ) of Section thirty (30) and the southwest quarter ( $\frac{1}{4}$ ) of Section twenty-nine (29), Township twenty-nine (29) south, Range five (5) west, Salt Lake Base and Meridian, consisting of 645 feet of six inch steel pipe, and 710 feet of Wooden Flume.

That said Transmission Line is located in the South half ( $\frac{1}{2}$ ) of Section twenty-four (24), the south-east quarter ( $\frac{1}{4}$ ) of Section twenty-three (23), the north half ( $\frac{1}{2}$ ) of Section twenty-six (26), north half ( $\frac{1}{2}$ ) of Section twenty-seven (27), and south-west quarter ( $\frac{1}{4}$ ) of Section twenty-seven (27), Township twenty-nine (29) south, Range five (5) west, Salt Lake Base and Meridian, three (3) miles of which said Transmission line are upon lands belonging to the plaintiff within the said Fillmore National Forest, as appears more particularly by the Plat hereto attached marked "Plaintiff's Exhibit A."

That said Telephone Lines, hereinbefore referred to, are located upon lands of the plaintiff within said Fillmore National Forest, extending from one of the buildings aforesaid (Manager's House) near the said Power House, above described, practically parallel to the said Transmission Line heretofore described, and a line  
6 from one of the buildings aforesaid (Manager's Office) near the said Power House practically parallel with the pipe line to the dam belonging to the defendant company, situated on the Beaver River.

The location of all of said elements composing the said Hydro-electric Power Works, belonging to the defendant being more particularly shown by the Plat hereto attached marked "Plaintiff's Exhibit A."

## III.

Plaintiff avers that no permission for the construction, maintenance, or use of the said Power House, or other structures or buildings, or said Pipe Lines or Conduit, Transmission Lines, or other elements composing the said Hydro-electric Power Works, hereinbefore described, was ever granted or given to the said defendant company, and no permission or authority to occupy or use said lands, for said purposes, was ever applied for to, or given by the Secretary of the Interior, or other officer of the United States prior to the inclusion of said lands in the said Fillmore National Forest; and no permission or authority to occupy or use said lands for said purposes, in accordance with the Rules and Regulation promulgated by the Secretary of the Department of Agriculture governing such matters has ever been applied for, or obtained, by the said defendant company from the Secretary of the Department of Agriculture, or from any officers of the National Forest Service, since said lands have become a part of the said Fillmore National Forest.

## IV.

7 The defendant has been accorded the fullest opportunity to comply with the Acts of Congress relative to the right to occupy portions of said Fillmore National Forest, and the Rules and Regulations of the Secretary of the Department of Agriculture duly promulgated in pursuance of said Acts, and thereby to obtain from the plaintiff permission to maintain and operate the said Power House, Pipe Lines or Conduit, Transmission Lines, Reservoir Telephone Lines, and the various other buildings and structures composing the said Hydro-electric Works, all of which are situated upon the plaintiff's land; but defendant has wilfully failed and refused to apply for or to obtain such permission under the Rules and Regulations aforesaid, and has continued and now continues from day to day, and month to month to wilfully hold the exclusive possession of the lands upon which are situated the said Power House, Reservoir, pipe lines or conduits, transmission lines, telephone lines, and the various other buildings and structures hereinbefore described, and to operate, use and enjoy the same in open and willful defiance of the rights of the plaintiff in the premises, and without a compliance, or a color of compliance with the laws enacted by Congress, or the Rules and Regulations duly promulgated by the Secretary of the Department of Agriculture in pursuance thereof, to govern the enjoyment of special privileges in the use and occupation of the lands within the confines of the National Forest.

That said operation produces, and has continuously produced, ever since the commencement thereof as aforesaid, powerful and copious currents of electricity which the defendant has caused, and is causing to be conveyed through appropriate transmission lines to various towns and localities within the State of Utah. That defendant has been disposing, and is disposing of such electricity for

money considerations to divers persons, firms, private corporations, municipalities who have been and are using the same for  
 8 various domestic, industrial, and other purposes, including the lighting of houses and streets and the propulsion of machinery, and for operating machinery for mining and other purposes.

That plaintiff has not and cannot obtain full information as to the uses of said electrical energy otherwise than by a full discovery to be exacted of the said defendant; but avers that most of the electrical energy produced by said defendant, by means of said hydro-electric works, has been and is being delivered by the defendant in return for large pecuniary considerations. Plaintiff is not definitely informed of the power capacity of said works, or the measure of power which has actually been developed in the operation thereof, and it cannot obtain such information otherwise than by a full discovery to be exacted of the said defendant in this cause; plaintiff avers however, that the power capacity of said works and the net electrical horsepower already produced by the operation thereof by the defendant are very large, but that no charge or permission for, or on account of, said operation for the exclusive and beneficial possession of said reserved lands which the defendant has already enjoyed has ever been paid by, or on behalf of the said defendant, or received by the plaintiff.

## V.

The defendant, unless restrained by this Honorable Court, will continue to operate the said works in manner as it has so heretofore done and therein to hold and enjoy the possession and use of the said reserved lands wherein the said described hydro-electric works are situated without compensation to the plaintiff, without its permission, and in open and willful violation of its laws, and to the  
 9 absolute exclusion of all of plaintiff's citizens who may desire to use, in whole or in part, the same lands for similar or other purposes with the plaintiff's permission, and pursuant to a full compliance with the laws and regulations touching such users.

The plaintiff alleges and submits to the Court that the defendant's exclusive appropriation of the said lands is a purpresture and a continuing trespass, and that the persistent operation of said works, without the permission and against the rights of the plaintiff, constitute a public nuisance which, if not promptly put down by the injunctive power of the Court will inevitably induce many persons to commit similar violation of the laws, and thus seriously embarrass the plaintiff in its endeavor to perpetuate its settled policies touching the use and enjoyment of National Forests and lead to a multitude of suits,

In consideration whereof, and for as much as the plaintiff is without full and adequate remedy in the premises, save in a Court of Equity, and to the end that said defendant, the Beaver River Power



Company, may make full, true and direct answer to all and singular the matters and things hereinbefore set out as fully as if it had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived; and to the end that the said defendant, during the progress of this cause, may finally and perpetually be enjoined from further operating the said works without the permission of the plaintiff, and from further obtaining, in whole or in part, its willful, unlawful, and tortious possession and occupancy within the said Fillmore National Forest without the permission of the plaintiff, and without first complying with the laws of the United States and the Rules and Regulations promulgated by the Secretary of the Department of Agriculture relating to National Forests; and to the end that the reasonable  
10 value of the enjoyment of the said Power House, the Reservoir Site, Pipe Lines or Conduits, Transmission Lines, Telephone Lines, and the various other buildings or structures heretofore described, on the reserved lands aforesaid, to be gauged by the duration of such enjoyment, the net power capacity of said works, and the scale of charges adopted in the existing regulations of the Secretary of the Department of Agriculture governing similar cases may be duly ascertained, and that the defendant may be compelled to account for and make corresponding pecuniary payment therefor to the plaintiff; and that the plaintiff may have such other and further relief as may seem just to this Honorable Court, and agreeable to equity and good conscience.

May it please Your Honor to grant unto the plaintiff a Writ of Subpoena, to be directed to the said defendant, the Beaver River Power Company, thereby commanding it by a certain time, and under a certain penalty therein to be limited, to appear before this Honorable Court and then and there full, true and direct answer make to all and singular the premises, and to stand to, perform, and abide by such order, direction or decree as shall be meet and agreeable to equity.

GEO. W. WICKERSHAM,  
*The Attorney General of the United States;*  
HIRAM E. BOOTH,  
*United States Attorney, District of Utah;*  
R. F. FEAGANS,  
*Assistant Solicitor, Department of Agriculture,*  
*Solicitors for Plaintiff.*

Filed October 25, 1912.

JERROLD R. LETCHER, *Clerk.*

(Here follows map marked page 11.)

1870  
The following  
is a list of the  
names of the  
persons who  
were present  
at the  
meeting of the  
Board of  
the  
City of  
New York  
on the  
10th of  
January  
1870.





12 That afterwards and on the 3rd day of February, 1913, the defendant herein filed its Motion to Dismiss, which Motion to Dismiss, being entitled in said Court and Cause, is in words and figures following, to-wit:

Comes now the said defendant and separately moves to dismiss from the alleged bill in equity, for insufficiency of fact to constitute a valid cause of action in equity, each of the following, to-wit:

1. The entire alleged bill in equity.

2. All of paragraph III of said bill, to-wit:

"Plaintiff avers that no permission for the construction, maintenance or use of the said power house or other structures or buildings or said pipe lines or conduit, transmission lines or other elements, composing the said hydro-electric power works hereinbefore described, was ever granted to the said defendant company, and no permission or authority to occupy or use the said lands, for said purposes, was ever applied for, or given by the Secretary of the Interior or other officers of the United States prior to the inclusion of said lands in said Fillmore National Forest; and no permission or authority to occupy or use said lands for said purposes in accordance with the rules and regulations promulgated by the Secretary of the Department of Agriculture governing such matters has ever been applied for, or obtained by the said defendant company from the Secretary of the Department of Agriculture, or from any officer of the National Forest Service, since said lands have become a part of the said Fillmore National Forest."

And the defendant separately moves to dismiss from said bill, each of the following from said paragraph III, to-wit:

(a) power house;

(b) other structures;

(c) buildings;

(d) pipe lines;

(e) conduit;

(f) transmission lines;

(h) other elements composing the said hydro-electric works.

(i) "\* \* \* no permission for the construction, maintenance or use was ever granted to said defendant company and no permission or authority to occupy or use said land for such purposes was ever applied for or given by the Secretary of the Interior or other officer of the United States prior to the inclusion of the said lands in said Fillmore National Forest.

13 (j) "\* \* \* and no permission or authority to occupy or use said lands for said purposes in accordance with the rules and regulations promulgated by the Secretary of the Department of Agriculture governing such matters has ever been applied for or obtained by said defendant company from the Secretary of Agriculture or other officer of the National Forest Service since said lands have become a part of said Fillmore National Forest."

3. All of paragraph IV of said bill, to-wit:

"The defendant has been accorded the fullest opportunity to comply with the Acts of Congress relative to the right to occupy

portions of said Fillmore National Forest, and the rules and regulations of the Secretary of the Department of Agriculture duly promulgated in pursuance of said acts and thereby to obtain from the plaintiff permission to maintain and operate the said power house, pipe lines or conduit, transmission lines, reservoir, telephone lines and the various other buildings and structures composing the said hydro-electric works, all of which are situated upon the plaintiff's land; but defendant has wilfully failed and refused to apply or to obtain such permission under the rules and regulations aforesaid and has continued and now continues from day to day and month to month to wilfully hold the exclusive possession of the lands upon which are situated the said power house, reservoir, pipe lines, or conduits, transmission lines, telephone lines and the various other buildings and structures hereinbefore described and to operate, use and enjoy the same in open defiance of the rights of the plaintiff

14 in the premises and without a compliance or a color of compliance with the laws enacted by Congress, or the Rules and Regulations promulgated by the Secretary of the Department of Agriculture in pursuance thereof, to govern the enjoyment of special privileges in the use and occupation of the lands within the confines of the National Forests.

That said operations produces and has continuously produced ever since the commencement thereof, as aforesaid, powerful and copious currents of electricity which the defendant has caused and is causing to be conveyed through appropriate transmission lines to various towns and localities within the state of Utah. That defendant has been disposing and is disposing of such electricity for money considerations to divers persons, firms, private corporations, municipalities who have been and are using the same for various domestic, industrial and other purposes, including the lighting of houses and streets and the propulsion of machinery and for operating machinery for mining and other purposes.

That plaintiff has not and cannot obtain full information as to the uses of said electrical energy otherwise than by a full discovery to be exacted of the said defendant, but avers that most of the electrical energy produced by said defendant, by means of said hydro-electric works has been and is being delivered by the defendant in return for large pecuniary considerations. Plaintiff is not definitely informed of the power capacity of said works, or the measure of power which has actually been developed in the operation thereof

15 and it cannot obtain such information otherwise than by a full discovery to be exacted of the said defendant in this cause; plaintiff avers however, that the power capacity of said works and the net electrical horse power already produced by the operation thereof by the defendant are very large but that no charge or compensation for, or on account of, said operation for the exclusive and beneficial possession of said reserved lands which the defendant has already enjoyed has ever been paid by, or on behalf of the said defendant or received by the plaintiff."

And the defendant separately moves to dismiss from said bill each of the following from said paragraph IV, to-wit:

- (a) power house;
- (b) pipe lines;
- (c) conduit;
- (d) transmission lines;
- (e) reservoir;
- (f) telephone lines;
- (g) various other buildings;
- (h) structures composing the said hydro-electric works;

(i) "The defendant has been accorded the fullest opportunity to comply with the Act of Congress relative to said Fillmore National Forest and the Rules and Regulations of the Secretary of Agriculture duly promulgated in pursuance of said acts and thereby to obtain from the plaintiff permission to maintain and operate the said power house, pipe lines or conduit, transmission lines, reservoir, telephone lines and various other buildings and structures comprising said hydro-electric works all of which are situated upon

16 the plaintiff's land, but defendant has wilfully failed and refused to apply for or obtain such permission under the rules and regulations aforesaid and has continued and now continues from day to day and from month to month to wilfully hold the exclusive possession of the said lands upon which are situated the said power house, reservoir, pipe lines, or conduit, transmission lines, telephone lines and various other buildings and structures hereinbefore described and to operate, use and enjoy the same in open and wilful defiance of the rights of the plaintiff in the premises and without compliance or color of compliance with the laws enacted by Congress, or the Rules and Regulations duly promulgated by the Secretary of the Department of Agriculture in pursuance thereof, to govern the enjoyment of special privileges in the use and occupation of the lands within the confines of the National Forests."

(j) "The said operation produces and has continuously produced ever since the commencement thereof, as aforesaid, powerful and copious currents of electricity, which the defendant has caused and is causing to be conveyed through appropriate transmission lines and to various localities within the State of Utah."

(k) "That defendant has been disposing and is disposing of such electricity for money consideration to divers persons, firms, private corporations and municipalities who have been and are using the same for various domestic industrial and other purposes, including the lighting of houses and streets and the propulsion of machinery and for operating machinery for mining and other purposes."

17 (l) "\* \* \* that plaintiff has not and cannot obtain full information as to the uses of said electrical energy otherwise than by a full discovery to be exacted of said defendant but avers that most of the electrical energy produced by said defendant by means of said hydro-electric works has been and is being delivered by the defendant in return for large pecuniary considerations."

(m) "Plaintiff is not definitely informed of the power capacity of said works or the measure of the power which has actually been developed in the operation thereof, and it cannot obtain such infor-

mation otherwise than by a full discovery to be exacted of the defendant in this cause; plaintiff avers however, that the power capacity of said works and the net electrical horse power already produced by the operation thereof by the defendant are very large, but that no charge for compensation for, or on account of said operation for the exclusive and beneficial possession of said reserved lands which the defendant has already enjoyed, has ever been paid by or on behalf of the defendant or received by the plaintiff."

4. All of paragraph V of said bill, to-wit:—"The defendant, unless restrained by this Honorable Court, will continue to operate the said works in manner as it has so heretofore done and therein to hold and enjoy the possession and use of the said reserved lands whereon the said described hydro-electric works are situated without compensation to the plaintiff, without its permission and in open and wilful violation of its laws and to the absolute exclusion of all  
18 of plaintiff's citizens who may desire to use, in whole or in part, the same lands for similar or other purposes with the plaintiff's permission and pursuant to a full compliance with its laws and regulations touching such uses."

"The plaintiff alleges and submits to the court that the defendant's exclusive appropriation of the said land is a purpresture and a continuing trespass and that the persistent operation of said works, without the permission and against the rights of plaintiff constitutes a public nuisance which if not promptly put down by the injunctive power of the court, will inevitably induce many persons to commit similar violations of the law and thus seriously embarrass the plaintiff in its endeavor to perpetuate its settled policies touching the use and enjoyment of the National Forests and lead to a multitude of suits."

And the defendant separately moves to dismiss from said bill each of the following from said paragraph V to-wit:

(a) "The defendant, unless restrained by this Honorable Court, will continue to operate the said works in manner as it has so heretofore done and therein to hold and enjoy the possession and use of the said public reserve lands whereon the said described hydro-electric works are situated without compensation to the plaintiff, without its permission and in open and wilful violation of its laws, and to the absolute exclusion of all of plaintiff's citizens who may desire to use in whole or in part, the same lands for similar or other  
19 purposes with the plaintiff's permission and pursuant to a full compliance with its laws and regulations touching such uses."

(b) "The plaintiff alleges and submits to the court that the defendant's exclusive appropriation of the said lands is a purpresture and a continuous trespass and that the persistent operation of said works, without the permission and against the rights of the plaintiff, constitutes a public nuisance which if not promptly put down by the injunctive power of the court,"

(c) "\* \* \* will inevitably induce many persons to commit similar violations of the law and thus seriously embarrass the plaintiff in its endeavor to perpetuate its settled policies touching the use

and enjoyment of the National Forests and lead to a multitude of suits."

- (d) Purpresture;
- (e) continuing trespass
- (f) public nuisance

Wherefore it is prayed that each of said motions to dismiss may be sustained.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,  
*Solicitors for Defendant.*

Copy hereof received as of this February 3, 1913, and it is hereby stipulated that the above motion may be filed and considered in lieu of the demurrer heretofore filed herein.

HIRAM E. BOOTH,  
*Attorney for Plaintiff.*

Dated February 3, 1913.

Filed February 3, 1913. Jerrold R. Letcher, Clerk.

20

*Order in re Motion to Dismiss.*

That afterwards and on the 31st day of March, 1913, the following order was made and entered, which being entitled in said court and cause is in words and figures following, to-wit:

This cause having been heretofore submitted on defendant's motion to dismiss certain portions of the complaint herein, and by the court taken under advisement, Now, after due consideration, it is Ordered by the Court that said motion be sustained as to parts of paragraph 4 subdivisions J, K, L & M of said motion and that it be denied as to the balance thereof.

J. A. MARSHALL, *Judge.*

21

*Amended Answer.*

That afterwards and on the 23rd day of November, 1914, the defendant by leave of Court filed its Amended Answer to the bill of complaint, which being entitled in said Court and Cause is in words and figures, following, to-wit:

The defendant, reserving all manner of exceptions that may have been had to the uncertainties and imperfections of the bill of plaintiff, comes and answers thereto, or to so much thereof as it is advised is material to be answered, and says:

I.

That this defendant is now, and at all times since on or about June 10, 1907, was a corporation duly organized and doing business under the laws of the State of Colorado, and since on or about November



8, 1907, qualified to do business within the State of Utah, under the laws of the said State of Utah, with power to construct, acquire, maintain and operate plants for generating electricity by use of water, steam and other power; to construct, acquire, maintain and operate ditches, canals and reservoirs for these and other purposes; to construct, acquire, maintain and operate telephone and power transmission lines, and to purchase, and otherwise acquire rights of way for any and all of said purposes.

Admits that defendant is now, and ever since on or about April 1, 1908, has been engaged in the continuous business of operating a certain hydro-electric power works, situate near the Town of Beaver, in Beaver County, State of Utah, and is and was generating and selling electric power for the operation of mines and mills, and for the lighting of municipalities, and other purposes, in the State of  
22 Utah, at reasonable prices, and not otherwise, and defendant denies that the pecuniary charges for the production and supplying of electrical energy by this defendant are such as it may choose to exact in return.

## II.

Defendant admits the allegations of paragraph II of plaintiff's complaint, except that the defendant denies that the hydro-electric power works, equipments, transmission lines, and other properties of the defendant, are situated wholly or at all, upon or within the land of the plaintiff, except as hereinafter expressly admitted or alleged.

Defendant denies that said land alleged to belong to the plaintiff, and occupied and used by defendant, together with much other land of the plaintiff, or at all, was set apart or reserved for national forest purposes on August 20, 1902, or by later proclamations issued by the President of the United States of America, dated January 24, 1906, appearing in Volume 34, Part 3 of the United States Statutes at Large, page 3189, and on April 25, 1907, appearing in Volume 35, Part 2 of the United States Statutes at Large, page 2182, respectively became a part of the Beaver National Forest, the name of which Forest, by executive order of the President of the United States of America dated June 18, 1908, was changed to that of the Fillmore National Forest, or that said land, occupied and used by defendant, has ever since remained, or now is, a part of the Fillmore National Forest.

The defendant denies that with respect to the rights, uses and occupancies of the defendant herein the said lands have ever been  
23 withdrawn from such uses or rights, and denies each and all of the matters aforesaid, except as hereinafter admitted, alleged and explained.

Defendant admits the allegations of plaintiff's complaint with respect to the location of the power house, and other works and structures of the defendant, as set forth and described in plaintiff's complaint, but the defendant denies that the said power houses, or other structures of the defendant, are located or situated upon the land of the plaintiff within said Fillmore National Forest, or that

said pipe lines or conduits are located or situated upon the lands of the plaintiff within said Fillmore National Forest as described, or at all, or that said other described works, structures, or transmission lines, or any thereof, are upon lands belonging to the plaintiff within said Fillmore National Forest, or which appears more particularly by the plat attached to plaintiff's complaint and marked Exhibit "A," or that said described telephone lines, or any thereof, are located upon lands of the plaintiff within said Fillmore National Forest, and denies that the plaintiff is the owner of, or entitled to the possession of all or any portion of the said lands occupied, used or enjoyed by the defendant, as set forth and described in plaintiff's complaint, or otherwise, or at all, or that the plaintiff has any interest therein, or any connection therewith, as to said lands so occupied or used, except as in this answer hereinafter expressly admitted, alleged and explained.

Defendant admits with respect to the lands described in plaintiff's complaint, and alleged to belong to the plaintiff herein, except as to those portions thereof occupied or used by the defendant herein, that said lands are public lands of the United States, held and  
 24 owned by the plaintiff under and pursuant to the laws of the United States and the State of Utah, and not otherwise.

The defendant alleges that in addition to the property, canals, works and structures referred to, and described in plaintiff's complaint as belonging to the defendant, the defendant is the owner of the following described property and rights of property, to-wit:

Lots three (3), four (4), five (5), six (6), seven (7), eight (8) and nine (9), and the East half of the Southwest quarter of Section six (6), Township 29 South of Range 4 West, Salt Lake Base and Meridian; and Lots one (1), two (2), five (5), six (6), seven (7), eight (8), nine (9) and ten (10), and the Southwest quarter of the Northeast quarter of Section one (1), Township 29 South of Range 5 West Salt Lake Base and Meridian, with all right, title and interest in and to the waters of Puffer Lake, lying within said above described land, in Beaver County, Utah, with the right under the local laws, customs and decisions of the courts of the State of Utah to impound and release therefrom and appropriate and use all the waters naturally flowing thereto.

That defendant is therein, in said Puffer Lake, storing water in flood season, and releasing the same in stages of low water, which is released into natural water courses emptying into said Beaver River, and thence diverted into the main conduit or pipe line of defendant's hydro-electric power plant described in plaintiff's bill of complaint herein, and thence returned to said Beaver River.

And said defendant, and its predecessors in interest, have been so doing, and so appropriating, reservoiring, withholding and  
 25 beneficially using the water so stored in said Puffer Lake since on or prior to the year 1895, and the right to the use and appropriation of said waters has been vested in the defendant, and its predecessors in interest, and those operating in conjunction with defendant, since on or prior to said date.



The defendant further alleges that the predecessors in interest of the defendant herein, on or about the 5th of July, 1895, entered upon the South Fork of said Beaver River, sometimes called Le Barron Creek, and made an appropriation and beneficial use of the waters of said South Fork by placing a dam across the South Fork, and reser-voiring the waters thereof in a certain reservoir made by a dam located in the Northeast quarter of the Southeast quarter of Section three (3), Township 30 South of Range 5 West, Salt Lake Base and Meridian, and said reservoir occupying a portion of the said South-east quarter of Section three (3), and also a portion of the South-west quarter of Section two (2), said township and range, and said water was appropriated, diverted and beneficially used and reservoired and withheld in said Creek and in said reservoir ever since the date last aforesaid, and the said right to the appropriation and beneficial use of said water has been vested and accrued under and in accordance with the laws of the State of Utah ever since the date last aforesaid, and has been beneficially used by the defendant, and its predecessors in interest, ever since said date, and is now diverted and used as an essential part of the water appropriation and hydro-electric system of the defendant herein, and the said property, and rights of property, and water and water rights, herein referred to and described, are and constitute an essential, important and indispensable element and part of the hydro-electric system referred to and  
26 described in plaintiff's complaint.

### III.

Defendant denies that no permission for the construction, maintenance, or use of the said power house, or other structures or buildings, or said pipe lines, or conduit, transmission lines, or other elements composing the said hydro-electric power works described in plaintiff's complaint, was ever granted to said defendant company, or that no permission or authority to occupy or use said lands for said purposes was ever applied for, to, or given by the Secretary of the Interior, or other officers of the United States, prior to the inclusion of said lands in said Fillmore National Forest, except as herein-after expressly admitted, alleged and explained.

Defendant denies that no permission or authority to occupy or use said lands for said purposes, in accordance with the rules or regulations promulgated by the Secretary of the Department of Agriculture, governing such matters, has ever been applied for or obtained by said defendant company from the Secretary of the Department of Agriculture, or from any officer of the National Forest Service, since said lands have become a part of the said Fillmore National Forest, except as hereinafter expressly admitted, alleged or explained.

### IV.

The defendant denies that the defendant has been accorded the fullest, or other opportunity, to comply with the acts of Congress, or any part thereof, relative to the right to occupy portions of said Fillmore National Forest, or the rules and regulations of the Secretary

of the Department of Agriculture, duly, or otherwise, promulgated in pursuance of said acts, or thereby, or at all, to obtain from the plaintiff permission to maintain or operate the said power house, pipe lines, or conduit, transmission lines, reservoir, telephone lines, or the various, or any other buildings or structures composing the said hydro-electric works; and denies that all or any of the same are situated upon the plaintiff's lands, except as hereinafter expressly admitted, alleged or explained.

Defendant denies that the defendant has willfully, or otherwise, failed or refused to apply for or to obtain such permission under the rules and regulations aforesaid, or has continued, or now continues from day to day and month to month to willfully or unlawfully hold the exclusive, or other, possession of the lands upon which are situated the said power house, reservoir, pipe lines, or conduit, transmission lines, telephone lines, or the various other buildings and structures in plaintiff's complaint described, or to operate, use or enjoy the same in open or willful defiance of the rights of the plaintiff in the premises, or without compliance, or color of compliance, with the laws enacted by Congress, or the rules or regulations duly, or otherwise, promulgated by the Secretary of the Department of Agriculture in pursuance thereof, to govern the enjoyment of special privileges in the use and occupation of lands within the confines of the National Forest; and the defendant denies that it has entered upon, occupied or used said lands, or any portion thereof, without compliance with all or any of the laws of Congress, or contrary thereto, or in violation thereof in any respect whatsoever, or without compliance with or in violation of any of the lawful, proper or authorized rules or regulations of the said Department of the Interior or Agriculture, or either thereof, or in any respect contrary to any  
 28 *pf* said rules, regulations or requirements, except as in this answer particularly alleged or explained.

## V.

Defendant admits that it is its intention to continue to operate said hydro-electric works, and unless restrained by this Court, will continue further so to do, but affirms and alleges that under the law it has the right and authority to so maintain and operate said hydro-electric works, and denies that the same is unlawful, or in open or willful, or any other violation of plaintiff's laws, or to the absolute exclusion, or any exclusion of any other citizen of the plaintiff.

Defendant denies that defendant's exclusive, or other appropriation of the said lands, is a purpresture, or a continuing or other trespass, and denies that the same is without the permission, or against the right of the plaintiff, and denies that the persistent, or other operation of said works, as in plaintiff's complaint set forth, constitutes a public, or any nuisance, which, if not promptly or otherwise put down by the injunctive power of the Court, will inevitably, or otherwise, induce many persons, or any persons, to commit similar, or any violations of the laws, or thus seriously, or otherwise, embarrass the plaintiff in its endeavor to perpetuate its settled policies touching

the use or enjoyment of national forests, or lead to a multitude of, or to any suits, and denies that the plaintiff has any settled policies, or any policies, touching the use or enjoyment of national forests, except as set forth in the acts of Congress with respect thereto.

29 Further answering the allegations of said paragraphs II to

V inclusive of plaintiff's complaint, the defendant admits, alleges and explains as follows:

Defendant admits that it is the owner of, and in the possession of, and operating and using the hydro-electric works, power houses, pipelines, conduits, transmission lines, reservoirs, telephone lines, and buildings and other structures, described and set forth in plaintiff's complaint, and herein referred to, and alleges that it is the owner of, and is appropriating and using the water and water rights referred to in plaintiff's complaint, and herein described, and that all thereof, including said lands so occupied and used, are necessary and indispensable in connection with the appropriation and beneficial use of said water, and the operation of said hydro-electric works, and the development and distribution of power therefrom.

The defendant further alleges that it holds a perpetual right over and upon the lands described in plaintiff's complaint, for the appropriation and beneficial use of the said water, and for the occupancy and use of the said power house, pipelines, conduits, transmission lines, reservoirs, telephone lines, and buildings and structures, and the appurtenances used in connection therewith, and that the acquisition and nature of said rights are hereinafter in this answer more particularly set forth. And the defendant alleges that the right, title and interest of the plaintiff, and its right to the possession and use of the lands described in plaintiff's complaint, is wholly subject to and subordinate to the rights, uses and enjoyments of the defendant

30 herein with respect to all and every part of the lands so occupied and used in connection with the appropriation and beneficial use of said water, and the production, distribution, and use of the electricity generated thereby, and sold and distributed therefrom.

The defendant admits that on August 20, 1902, an executive order of the President of the United States was promulgated and issued, reserving, or purporting to reserve, from entry or settlement, for national forest purpose Townships 29 and 30 South Range 5 West, and Township 29 South Range 6 West, Salt Lake Base and Meridian, and defendant alleges that by said orders the said reserve was merely a temporary withdrawal, and did not purport or claim to be a permanent reservation for national forest purposes. And the defendant alleges that thereafter a proclamation was issued by the President of the United States, dated April 18, 1904, vacating said previous order of withdrawal so far as it applied to or affected Sections three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9) and ten (10), and Sections fifteen (15) to thirty-six (36) inclusive in Township 29 South Range 6 West, Salt Lake Base and Meridian.

And defendant further alleges that by proclamation issued by the President of the United States, dated October 5, 1905, all of Townships 29 and 30 South Range 5 West, Salt Lake Base and Me-

ridian, and Sections one (1) and two (2), and Sections eleven (11), twelve (12), thirteen (13) and fourteen (14) of Township 29 South Range 6 West, Salt Lake Base and Meridian, were vacated, and said lands restored to settlement.

And defendant alleges that from and during the period from April 18, 1904, Sections twenty-three (23), twenty-four (24),  
 31 twenty-five (25), twenty-six (26) and twenty-seven (27) in Township 29 South Range 6 West, Salt Lake Base and Meridian, up to and including April 25, 1907, were open, unoccupied public domain of the United States, and not reserved lands of the United States.

And defendant alleges that from October 5, 1905 Townships 29 and 30 South Range 5 West, Salt Lake Base and Meridian, were, up to January 24, 1906, open, unoccupied and unreserved lands of the United States.

Defendant admits that on January 24, 1906, and on April 25, 1907; the President of the United States issued a proclamation, setting apart, or purporting to set apart, as public reservations for national forest purposes large bodies of public lands of plaintiff, situate, lying and being within the limits of the State and District of Utah, and in and by which proclamation the said reservation was named the "Beaver National Forest", and the boundaries thereof were therein specifically described. And admits that a further executive order was promulgated by the President of the United States, dated June 18, 1908, wherein modifications were made by the President of the United States, by the change of the name thereof to that of "Fillmore National Forest".

The defendant admits the promulgation and issuance of the orders aforesaid, and as herein alleged, by the President of the United States, but alleges that the lands therein described were not, nor were any thereof, thereby or at all withdrawn from the rights, uses or occupancies referred to and described in plaintiff's complaint of the defendant herein. Upon the contrary, defendant alleges that all of the lands referred to and described in plaintiff's complaint, so used or occupied by the defendant herein, were at and during all of  
 32 said times open to the use and enjoyment of the defendant herein for the appropriation and beneficial use of the waters appropriated and used, and for the beneficial use and enjoyment of the rights and privileges and occupancies of the defendant upon said public lands, and all thereof, for the appropriation and beneficial use of said waters, and the beneficial use and distribution of the products thereof, including the electric power generated thereby and in connection therewith, and used and distributed as in plaintiff's complaint and hereinafter in this answer more specifically alleged and set forth.

The defendant further alleges, admits and explains with respect to said paragraphs II to V inclusive of plaintiff's complaint, that on and prior to the 5th day of October, 1905, the said lands described in plaintiff's complaint, and all thereof, now, or at any time used or occupied by the defendant herein in connection with the appropriation and use of said water, and of the said hydro-electric

works and transmission lines, were open, unreserved public lands of the United States; and that on or about the 5th day of October, 1905, the predecessors in interest of the defendant herein, then being upon said lands, and engaged in the work of appropriating said waters, did, under and in accordance with the laws of the State of Utah, appropriate, and gave notice of appropriation of said waters, and all thereof, now appropriated and used in connection with said hydro-electric development, and ever since said appropriation the said defendant herein, and its predecessors in interest, have complied with all of the laws of the State of Utah with respect to the appropriation and beneficial use of all of the water so appropriated, used, and

33 have diverted, appropriated, and beneficially used said waters, and are now appropriating and beneficially using the same, and the defendant has acquired, and now holds and owns all of the rights in connection with the appropriation and beneficial use of said waters, and such right so to appropriate and beneficially use said water is accrued and vested under and in accordance with the laws of the State of Utah, and the decisions of the courts of said State.

That prior to the 15th day of June, 1905, the defendant herein, and its predecessors in interest as aforesaid, had made appropriation of, and gave notice of appropriation of said waters for such beneficial uses under the laws of the said State, and had, under and in accordance with said laws, expended large sums of money in the necessary work connected with the appropriation and use of said water, and the plaintiff herein, through its officers, gave notice of its desire and intention to establish a forest reserve over and including the said lands, so necessarily to be used for and in connection with the appropriation and beneficial use of said water. And thereupon it was arranged and agreed between the predecessors in interest of the defendant herein, and the plaintiff herein, its officers and representatives, that the plaintiff would, acting through the executive authority of the President of the United States, and by executive order, create the Beaver National Forest, covering and including the lands now occupied and used by the defendant for the appropriation and beneficial use of said waters, and the development and distribution of said hydro-electric power. And it was thereupon expressly understood and agreed that the establishing and creation

34 of the said National Forest, under the claims of the representatives of the plaintiff, would seriously interfere with, if it did not prevent, the appropriation and beneficial use of said waters, and the generation and distribution of said electric power, except and unless the rights and future procedure of the defendant and its predecessors was agreed upon, confirmed and established in some definite way.

And the said plaintiff herein, and the said State of Utah and its representatives, and the defendant's predecessors, all being desirous, and desiring that the said waters should be appropriated and beneficially used, and said hydro-electric development should be established, and electricity generated thereby and distributed therefrom, it was then arranged, understood and agreed that such executive



order creating said Beaver National Forest, as set forth and described in plaintiff's complaint, should be issued and promulgated, and it was further understood and agreed that as soon as the said executive order creating said National Forest had been promulgated and issued that a right of way under the Act of February 1, 1905, and which grants rights of way within and through the national forests during their period of beneficial use, to-wit: during the period of the beneficial use of such appropriated waters, should be allowed and granted to the defendant's predecessors.

That thereupon, and subject to such understanding and arrangement, the said executive order, establishing said Beaver National Forest, was promulgated and issued, and with the understanding that the rights of the defendant's predecessors in interest, to the appropriation and beneficial use of said waters, and in connection with the establishment, installation and use of said hydro-electric development and distribution connected therewith, should be obtained and granted under said Act of February 1, 1905,

35 and the said understanding and arrangement continued after the promulgation of said executive order establishing said Beaver National Forest.

That thereupon the said executive order, as set forth in plaintiff's complaint, was promulgated on January 24, 1906, and thereafter and consistent with the said understanding and arrangement, and with the full notice, knowledge and acquiescence of the plaintiff herein, its officers and representatives, including the Secretaries of Agriculture and of the Interior, and the Forester in charge of the Forest Department of the United States, the predecessors in interest of defendant, being in and upon said Forest Reserve, continued and proceeded with the construction of the necessary dams, reservoirs, ditches, aqueducts and diverting works for the appropriation and beneficial use of said water, and also including the construction of the necessary power houses, appurtenances and equipments and transmission lines for the production and distribution and beneficial use of the said waters, and of the electric power and energy generated thereby. And thereafter, and during the years 1906, 1907 and a part of the year 1908, the defendant herein, and its predecessors, completed all of the necessary dams, ditches, aqueducts, structures, power houses and transmission lines, for the appropriation and beneficial use of said water, and the production and generation of electric power thereby, and the use and disposition of the same, and in so doing defendant, and its predecessors, expended large sums of money, to-wit: in excess of five hundred thousand dollars (\$500,000.00).

And the defendant further alleges that in all of the procedure prior to the promulgation of such order establishing such Forest

36 Reserve, the plaintiff herein, its officers and representatives, acquiesced in and encouraged the entry upon said lands, and the appropriation and beneficial use of said water, and the generation and distribution of said electric power, and said orders of withdrawal of portions of said lands from the effect of, said preliminary order establishing said Forest Reserve, and exempting certain portions of said land therefrom, were for the purpose of assisting

and encouraging the appropriation of said water, and the installation of said hydro-electric plant, and the said Forest Reserve was established and created as aforesaid upon the understanding and agreement with the plaintiff, and its officers and agents, that the same would not interfere with the appropriation or beneficial use of said waters, or the installation or production of said electric power, but should be in aid and assistance thereof, and that all rights necessary and incident thereto should be allowed and granted under the said Act of February 1, 1905 as aforesaid, and after said Forest Service was created, the defendant herein, and its predecessors, proceeded with the installation and construction of said works and structures as aforesaid, with the acquiescence, consent and approval of the plaintiff herein, its officers and agents, and upon the understanding as aforesaid, and consistent with such understanding, and in pursuance thereof, the defendant herein completed the appropriation and beneficial use of said water, and the installation of its said works, and the generation and distribution of said electric power, and not until after the completion of said works, and on or about the 13th day of April, 1910, the plaintiff herein, through its Secretary of Agriculture, notified the defendant herein that it would not grant the permit to the defendant herein for the beneficial uses in connection with its said power works, as described in plaintiff's complaint and described herein, and thereupon the plaintiff refused, and has ever since refused to carry out or comply with the arrangement and understanding so entered into at the time and in the manner above stated.

That at or about the date last aforesaid the plaintiff herein tendered to and demanded of the defendant that it enter into a permit agreement with the plaintiff, but the said permit agreement was not consistent with, nor was it claimed *to* be consistent with the understanding aforesaid, but contained many regulations and provisions which were wholly contrary to such agreement and understanding as aforesaid, and were wholly contrary to, and wholly unauthorized by the laws of Congress, and were not fair or reasonable, and were unauthorized and unreasonable and contrary to the rights and interests of the defendant herein under the laws of the State of Utah, and under and in accordance with the laws of the United States.

The defendant alleges that it is not true that no permission for the construction or maintenance or use of said power house, or other structures or buildings, or said pipelines or conduit, transmission lines, or other elements composing said hydro-electric power works, hereinbefore described, was ever granted to said defendant company, or its predecessors, and that no permission or authority to occupy or use said lands for said purpose was ever applied for, to, or given by the Secretary of the Department of Agriculture, or other officer of the United States, prior to the inclusion of said lands in said Fillmore National Forest, and it is not true that no permission or authority to occupy or use said lands for said purposes has ever been obtained by the said defendant company, or its predecessors, from the Secretary of the Department of Agriculture, or from any officer of the National Forest Service, since said lands have become a part of the Fillmore National Forest.

Upon the contrary, the defendant alleges that prior to the creation of said Beaver National Forest, and after certain portions thereof entered upon by the defendant had been exempted from the said previous withdrawal of said lands, under the temporary order hereinbefore referred to, the said defendant, and its predecessors in interest, had proceeded, with the full notice, knowledge and acquiescence of the said plaintiff, and its officers and representatives, in the appropriation of, and proceedings necessary to the appropriation and beneficial use of said water, and after the order of January 24, 1906, was promulgated, establishing said Beaver National Forest, the defendant, and its predecessors, with the full knowledge, permission and acquiescence of the plaintiff herein, its officers and agents, and upon their agreement that the rights of the defendant, and its predecessors, in so appropriating said waters, and in constructing said hydro-electric works, would be fully recognized and protected, and subject to the understanding and agreement that said rights would be granted and permitted under and in accordance with said Act of February 1, 1905, defendant's predecessors and defendant proceeded with and completed the appropriation of said water, and the works incident and necessary thereto, and the generation and distribution of said electric power, and the works and structures necessary and incident thereto, and during all of said time was ready and willing, and offered to take and receive such approval under said Act of February 1, 1905, and in all respects to comply with and carry out the agreement and understanding aforesaid, and under and in

39 connection with which defendant, and its predecessors, had entered upon the said lands and constructed the said works, but that the plaintiff has, after the completion of said construction, the appropriation of said water, and the generation, distribution and use of said electric power, wholly failed and refused to grant the said permission under said Act of February 1, 1905, or otherwise, so far as its officers and representatives are concerned, or to recognize or approve the same, but has, in total disregard of the rights of the defendant under and in accordance with the laws of the United States of America, and the acts of Congress, and also in like disregard of its rights under the arrangement, agreement and understanding aforesaid, ever since refused, and now refused to acknowledge or recognize the rights of the defendant herein, and has proceeded, contrary to law and to the acts of Congress aforesaid, and contrary to the understanding and agreement so entered into, and under which said water was appropriated, and said hydro-electric system was installed, and has brought this action, and otherwise attempted to deprive the defendant of its rights under and in accordance with the laws of the United States, and the laws of the State of Utah, and also to deprive the defendant of its rights under and in accordance with the understanding and arrangement, so arrived at, entered into, and proceeded with as aforesaid.

Further answering said complaint, and with reference to said paragraphs II to V thereof, and with special reference to paragraph IV of said complaint, the defendant alleges:

That it has complied with all of the acts of Congress, and with all



of the laws of the United States of America with respect to the entry upon, occupation and use of all of the property occupied, and  
40 used by the defendant in connection with the appropriation and beneficial use of said waters, and with the development, distribution and use of said hydro-electric power, and in that regard the defendant alleges that it has complied with, and offered to comply with all of the rules and regulations of the plaintiff, or of the Department of the Interior or of Agriculture, lawfully adopted under or authorized by any of the acts of Congress aforesaid, and in that respect and behalf the defendant alleges that the original appropriation, and the notice of appropriation of said water, and the work done preliminarily to the appropriation and beneficial use thereof, under and in accordance with the laws of said State, was done as to the greater portion thereof upon the public and unreserved lands of the United States, and all thereof was done upon lands which were either then or thereafter, and during the course of the work essential to the said appropriation, unreserved public lands of the United States, and that there were no rules or regulations of the plaintiff, or either of said Departments, in any manner applicable to the appropriation of said water, or the procedure thereunder connected with the said beneficial use thereof, and that after the order creating said Forest Reserve was promulgated, as hereinbefore alleged, in the month of February, 1906, that the defendant herein, and its predecessors, proceeded, as hereinbefore alleged, with the approval, consent and acquiescence of the plaintiff, and its said officers and representatives, and thereafter, and after the completion of the appropriation of said water and the application of the same to beneficial uses, and after the generation and distribution of the electric power produced thereby, the said officers of the plaintiff herein, and particularly the  
41 Secretary of Agriculture, purported and pretended and claimed to adopt certain rules and regulations, which rules and regulations were without any authority of any act of Congress whatsoever, were wholly unauthorized, unreasonable, contrary to and in violation of the laws of Congress, null and void, and that such illegal, unauthorized and unreasonable rules have not been complied with by the defendant herein for the reason, and solely for the reason, that the same are illegal, unauthorized, null and void, and the defendant herein submits and attaches to this answer, and makes a part thereof, the rules and regulations adopted by and claimed to be in force by the Secretary of Agriculture, which said rules and regulations had been adopted, or were claimed to have been adopted, prior to the commencement of this action, and are the rules and regulations referred to in plaintiff's complaint, and which are therein alleged to have been required of the defendant, and which it is alleged the defendant refused to accept or enter into.

And the defendant further alleges that at and prior to the commencement of this action the said rules and regulations herein elsewhere set forth, referred to, and made a part hereof, were embodied into what were styled "permit agreements", and prior to the commencement of this action, and after the completion and installation of defendant's structures and works, and the appropriation and

beneficial use of the water herein referred to, and after the installation of said hydro-electric power plant, and the production, distribution and use of power therefrom, the plaintiff herein, by its said officers, demanded of the defendant that it acquiesce in said illegal, unauthorized and unreasonable rules and regulations, and enter into said permit agreement with the plaintiff herein, and on account of the refusal of the defendant so to enter into such permit agreement, and to submit to and acquiesce in said rules and regulations, the

42 plaintiff has brought this action, and seeks the relief by the plaintiff prayed for in its complaint, and the defendant has never refused to abide by or submit to the laws of Congress, or to any rules or regulations of the plaintiff authorized thereby and adopted thereunder, but has refused and does refuse to submit to the excessive, unreasonable, unlawful and unauthorized rules embodied in said permit agreement, and herein in this answer elsewhere set out and referred to, and made a part hereof.

For a further and separate answer and defense herein, the defendant alleges:

That long prior to the commencement of this action, to-wit: during the year 1895, to and including the year 1908, the defendant herein, and its predecessors in interest, under and in accordance with the laws of the State of Utah, appropriated and diverted the waters referred to and described in plaintiff's complaint and in this answer, and constructed, installed and equipped its hydro-electric plant connected therewith, and also described and referred to in plaintiff's complaint and in this answer, and that said water was appropriated, and the dams, works, reservoirs, ditches, aqueducts, pressure lines, and other necessary and appurtenant works and structures were constructed and equipped by the defendant, and its predecessors, for that purpose, and said connected hydro-electric plant for the beneficial use of said water was similarly constructed, installed and equipped, as located and described in plaintiff's complaint, during said years, with the full knowledge, and with the acquiescence, permission and approval and consent of the plaintiff herein, and upon the lands and

43 premises described in plaintiff's complaint, and all thereof was done under and in accordance with the laws of the State of Utah, and said water was appropriated and applied to such beneficial uses, and the water produced thereby was generated for the purpose of sale, rental and distribution to the inhabitants of the said State of Utah.

That the beneficial uses to which said water and electric power have been applied by the defendant, and its predecessors, are the irrigation of lands, the operation of mines and mills for the reduction of ores, for the operation of factories, for supplying light, for the municipal uses of cities and towns, and for the domestic and other necessities of the inhabitants thereof. That said power generated by the use of said water has been supplied, and is now being supplied for all of the uses and purposes aforesaid, to all of the cities and towns, and the inhabitants thereof desiring the same, or the said State of Utah within the district reached and supplied by the lines and distributing system of the defendant herein, referred to and described, and that the right and duty of the defendant to appro-

prate and continue the appropriation of said water, and to apply and supply the same to the beneficial uses and purposes aforesaid, and for the uses of said cities and towns, and for the inhabitants thereof, and the inhabitants of said State, and for the purpose of carrying on the industries operated thereby has been, and for more than five years prior to the commencement of this action, has been accrued, fixed and vested under and in accordance with the laws of said State, and is necessary and indispensable for the public uses aforesaid.

That said electric power is distributed and supplied to twenty or more cities, towns and villages, and the inhabitants thereof, and to the communities, individuals and industries occupying the  
44 territory covered by the distributing lines of the defendant, and is so supplied and furnished to all persons needing and desiring the same.

That the said business and industry of the defendant so carried on is a public service and in accordance with the laws of the said State of Utah, and the said electric energy generated by the use of said water is sold, furnished and distributed to all persons, corporations and municipalities needing or desiring the same within the territory reached by and capable of being supplied from the distributing lines of the defendant herein, and the right and duty of the defendant to continue said service is fixed under and in accordance with the laws of the said State, and the defendant herein may be compelled, and is subject to be compelled by the laws of the said State, and by the authority of the courts thereof, to continue such service, and to supply said electric power, to all of the inhabitants and citizens of said State, and the municipalities thereof desiring and demanding and in a position to receive the same, and the defendant has no right or authority to cease the said service, or to cease to supply the said water, and the products thereof, and said electric power to the persons now receiving and enjoying the same, and there is no other available supply of water or power or energy to carry on the service, and to supply the public necessities herein referred to and described, and if the same was prevented or interrupted, great and irreparable injury would be done to the defendant herein, and to all of the citizens and inhabitants of the said State, and to the municipalities thereof, by the interruption of said service, and the right and duty of the defendant to use and enjoy said property, and to use and enjoy the necessary rights over all of the lands and  
45 property described in plaintiff's complaint, and to continue said public service is vested and fixed under and in accordance with the laws of the said State, and is a continuing and perpetual right, and a continuing and perpetual use and necessity.

For a further and separate answer and defense herein, the defendant alleges:

1. The Territory of Utah was created by an Act of Congress approved September 9, 1850, which provided among other things that the legislative power of said Territory should be vested in the Governor and a legislative assembly, and should extend to all rightful subjects of legislation consistent with the Constitution of the United

States and the provisions of said Act, but that no law should be passed interfering with the primary disposal of the soil, and further provided that all the laws passed by the legislative assembly and Governor should be submitted to the Congress of the United States, and that if disapproved they should be null and of no effect.

2. An Act of the Legislature of the Territory of Utah, approved by the Governor of said Territory, February 20, 1880, contained the following:

"SEC. 6. A right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of, and reasonable necessity for such use thereof, under any of the following circumstances: First—Whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water course, lake, or spring, or other natural source of supply. Second—Whenever any person or persons shall have had the open, peaceable, uninterrupted and continuous use of water for a period of seven years."

46 "SEC. 7. A secondary right to the use of water for any of said purposes is hereby recognized and acknowledged to have vested and accrued (subject to the perfect and complete use of all primary rights) to the extent of and reasonable necessity for such use thereof, under any of the following circumstances: First—Whenever the whole of the waters of any natural stream, water-course, lake, spring, or other natural source of supply has been taken, diverted and used by prior appropriators for a part, or parts of each year only; and other persons have subsequently appropriated any part, or the whole, of such water during any other part of such year, such person shall be deemed to have acquired a secondary right. Second—Whenever, at the time of an unusual increase of water exceeding seven years' average flow of such water, at the same season of each year, all the water of such average flow then being used by the prior appropriators, and other persons appropriate and use such increase of water, such persons shall be deemed to have acquired a secondary right."

"SEC. 12. Whenever the terms mentioned in this section are employed in this Act, they are employed in the sense hereinafter affixed to them, except where a different sense plainly appears: First—The term 'person,' when applicable, includes 'firm,' 'partnership,' 'joint stock company,' 'association' and 'corporation.'"

"SEC. 15. All persons shall have the right of way across and upon public, private and corporate lands, or other right of way, for the construction and repair of all necessary reservoirs, dams, water-gates, canals, ditches, flumes, or other means of securing and conveying water for any necessary public use, or for draining, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property."

3. The said Act of the Legislature of the Territory of Utah was duly submitted to the Congress of the United States, but was not disapproved, and the said Act remained and continued to be the law of said territory.

47 . 4. The Territory became the State of Utah, and as such was admitted into the Union on an equal footing with the original states, on January 4, 1896, pursuant to an Act of Congress called "The Enabling Act," approved July 16, 1894, and a Proclamation of the President of the United States issued January 4, 1896. The said Enabling Act provided by Section 19 that all laws in force made by said Territory at the time of its admission into the Union should be in force in said State, except as modified or changed by said Act or by the Constitution of said State. The Constitution of the State of Utah, adopted November 5, 1895, provided by Article XVII that all existing rights to the use of any of the waters of the State for any useful or beneficial purpose were thereby recognized and confirmed, and further provided, by Article XXIV, Sec. 2, that all laws of the Territory of Utah then in force, not repugnant to said Constitution, should remain in force until they expired by their own limitations, or were altered or repealed by the Legislature. The Act of the Legislature of the Territory of Utah, approved February 20, 1880, hereinabove mentioned, was not modified or changed by the Act of Congress approved July 16, 1894, and was not repugnant to the Constitution of the State of Utah or the Constitution of the United States, and accordingly became the law of said State.

5. An Act of the Legislature of the State of Utah, approved April 5, 1896, entitled "An Act to encourage the Irrigation of Land, the Mining, Milling, Smelting and other reduction of Ores, and the use and application of the Unappropriated Waters of Natural Streams and Water-courses to the Generation of Electrical Force and Energy, and to provide for the exercise of the right of Eminent Domain therefor" contained the following:

48 "The cultivation and irrigation of the soil, the production and reduction of ores, are of vital necessity to the people of the State of Utah; are pursuits in which all are interested, and from which all derive benefit; and the use and application of the unappropriated waters of the natural streams and water-courses of the State to the Generation of electrical force or energy to be employed in industrial pursuits are of great public benefit and utility. So irrigation of land, the mining, milling, smelting or other reduction of ores, and such use and application of such waters for the generation of electrical power to be employed as aforesaid, are hereby declared to be for the public use, and the right of eminent domain may be exercised in behalf thereof."

An Act of the Legislature of the State of Utah, approved March 11, 1897, entitled "An Act in relation to Water Rights and Irrigation and making Provisions regulating the same," contains the following:

"Any person or corporation shall, have the right of way across and upon public, private and corporate lands, or other right of way, for the construction, maintenance, repair and use of all necessary reser-



voirs, dams, water gates, canals, ditches, flumes, tunnels, or other means of securing, storing and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use."

6. It has always been the custom of the inhabitants of said Territory and State to appropriate and use waters of the rivers and streams therein for mining, agricultural, manufacturing and all other useful purposes through the construction of reservoirs, dams, canals, ditches, flumes or other means of diverting and conveying the water from such rivers and streams to the point of beneficial use. Such appropriation and use of water has been necessary in the settlement and development of said Territory and State. Originally all of  
49 the land in said Territory and State was, and about 90% thereof still is, public land of the United States. It has always been the custom of the inhabitants of said Territory and State to construct reservoirs, canals, ditches, flumes or other means of diverting and conveying water upon such public land without applying for or obtain- any permission from any representative of the United States, or paying any compensation therefor. It has always been recognized by the local customs, laws and decisions of the courts of said Territory and State that any beneficial use of water was a public use, that any person or corporation who first appropriated the water of any river or stream and applied the same to some beneficial use, acquired a vested right to the water so appropriated, (such right being measured by the extent of the beneficial use), and to any reservoir, canal, ditch, flume or other means of diverting or conveying water, constructed and used for such purpose, and also rights of way therefor upon or over the public land of the United States, and that any person or corporation entitled to the use of water might thereafter change the point of diversion and the point and purpose of beneficial use. By Acts of Congress approved July 26, 1866, and July 9, 1870, and by Sections 2339 and 2340 of the Revised Statutes of the United States — formally recognized the existence and validity of such local customs, laws and decisions of courts, and formally declared that the possessors and owners of such vested rights to water and rights of way therefor for mining, agricultural, manufacturing or other purposes, should be maintained and protected in the same. No officer or other representative of the United States has until some time in 1909 questioned any such rights to the use of water, or any such rights of way over land of the United States, or demanded or attempted to exact any compensation for any such rights of way.  
50

Defendant further alleges that the territory now embraced within the State of Utah was acquired by the Government of the United States under and in accordance with the Treaty with the Republic of Mexico, dated February 2, 1848, under and in connection with which Treaty it was stipulated and agreed on the part

of the United States with the said Republic of Mexico that the said territory should be incorporated into the Union of the United States, and be admitted at the proper time, to be judged of by the Congress of the United States, to the enjoyment of all of the rights of citizens of the United States, according to the principles of the Constitution of the United States.

That pursuant to an Act of Congress called the Enabling Act, approved July 16, 1894, and consistent with this Treaty, the Territory of Utah was admitted to the American Union as a state, on an equal footing with the original states, and with all of the other states of the Union, in all respects whatsoever.

That under and in accordance with the Constitution of the United States, the right, title and possession of the Government of the United States over and in connection with the public lands, is held subject to the right of each and every one of the states to utilize and develop its resources, and to construct and operate all necessary ways and means of communication and development, and that the right to the appropriation and beneficial use of water, with the necessary rights of way over the public lands, so held by the United States, was inherent in each and all of the states, and upon its becoming a member of the American Union the State of Utah acquired and held, and now holds, the right to the appropriation and benefi-

51        cial use of the waters of the said state flowing in the streams thereof, and with and including the necessary rights of way and other occupancies and uses essential to the appropriation and beneficial use of said water, and the products of the same, and that the right of sovereign control over the said lands so held by the United States is in the State of Utah, and in all of the other states of the Union, and the Government of the United States, by the acts of Congress and the decisions of the courts of the United States, has always recognized the inherent right of each of the states to the appropriation and beneficial use of its waters, and the necessary and essential rights of way therefor, and the Congress of the United States by the various acts of Congress, and which have been embodied in the Statutes of the United States, has recognized and confirmed the right of the states, and the citizens and inhabitants thereof, and all others authorized by the laws of such state, to appropriate and beneficially use the waters of said state, and has also recognized and confirmed the right to the necessary rights of way for the appropriation and beneficial use of said waters, and each and all of the Forest Reserves of the United States, which have been created or established by executive order, have been created and established and exist under the express enactment and declaration of Congress that the waters therein shall be subject to appropriation and beneficial use, and by no act of Congress has the Government of the United States ever attempted to restrict, prevent or interfere with the appropriation and beneficial use of water within the forest or other reserves of the United States, but has expressly recognized, acknowledged and confirmed the said right, and the continuous use and enjoyment of the same, and the various Departments of the Federal Govern-  
52        ment, including the Department of the Interior and the Department of Agriculture, have never been authorized to adopt

any rules or regulations preventive of, or restrictive of, or imposing any burdens or obligations upon the appropriation or beneficial use of water within any of the states of the Union, or within any forest reserve, but have been, by the said acts of Congress, prohibited from adopting any rules or regulations preventive of, or restrictive of, or limiting or imposing any charges or obligations in connection with the appropriation or beneficial use of water within any state, or within any forest reserve established or situated within any state. That under the Constitution of the United States the United States holds and owns the public lands as a proprietor thereof, and that no municipal power or powers of government are attendant upon or connected with the ownership or possession of the public lands, and that the powers of the Government of the United States within each and every one of the states, for all municipal or governmental purposes, are identical in each and all of the states, and are no greater and no less in those states having public lands than in those states where there are no public lands, or in which there never have been any public lands, and that the Government of the United States cannot exact of any one of the states the surrender of any of its powers upon or in connection with its admission to the Union, or upon or in connection with the possession or ownership of any of the public lands therein by the United States.

That notwithstanding the premises, and notwithstanding the prohibition contained in the Constitution of the United States against the exercise of any municipal powers within any state by the United

53 States Government, under or in connection with the ownership or use of the public lands, and notwithstanding the inherent right of the states to the appropriation and beneficial use of its waters, and the necessary rights of way therefor over the public lands, and notwithstanding the acts of Congress aforesaid, acknowledging, confirming and approving said rights, and notwithstanding the acts of Congress acknowledging and confirming and continuing such rights within the forest reserves of the United States for the appropriation and beneficial use of the waters within such reserves by the state, and its inhabitants, and those authorized by its laws, the Secretary of Agriculture of the United States and the Secretary of the Interior have very recently, and shortly before the commencement of this action, adopted, or pretended to adopt certain wholly unauthorized, unconstitutional and illegal rules, regulations and restrictions, not only upon and limiting the right of appropriation and beneficial use of water within the states, and upon the public lands, and within the forest reserves therein situated, but have undertaken, and are now undertaking to subject the right to the appropriation and beneficial use of water already appropriated, and the right to the use and enjoyment of rights of ways already devoted to and used in connection with such appropriation of the waters of said state, and the development and distribution of the products thereof, to the aforesaid illegal, unauthorized and unconstitutional rules and regulations, under and in connection with which the said officers of the said Government not only seek to prevent the appropriation and beneficial use of the waters within such states, and upon the



public lands, and within the forest reserves, but also seek to subject existing appropriations and existing beneficial uses to the power and authority of the said United States, and of its said officers, and in addition thereto, by the said rules and regulations, are undertaking to assert, and thereby do assert, the right to exercise certain municipal and other governmental powers within the State of Utah and other states, wholly contrary to the Constitution of the United States, and wholly unauthorized and unwarranted by any act of the Congress of the United States.

54 A copy of said rules and regulations so referred to, and so claimed to have been adopted, and which are sought in this action to be enforced, is hereto annexed, and is marked Exhibit "A," and is made a part of this answer.

This action is brought and prosecuted for the purpose of illegally and unlawfully, and contrary to the constitutional rights of the State of Utah, and of this defendant, and of the inhabitants of the said State, subjecting this defendant, and the inhabitants of the said State of Utah, and all of the customers of the defendant enjoying said waters, and the beneficial use thereof, to exceptional charges, exceptional taxes, and exceptional rules and regulations, and of certain powers of Government to be exercised by the said heads of the said Departments of the Government of the United States, without any warrant or authority under or in connection with the Constitution of the United States, or of any act of Congress, but wholly contrary both to the Constitution of the United States, and to the acts of Congress aforesaid. And that the defendant has refused, and now refuses to acquiesce in or submit to the said rules or regulations, or accept or enter into the same except insofar as any thereof (if any there be) are consistent with the Constitution of the United States or the laws of Congress adopted pursuant to the same.

And the defendant further alleges in that behalf that all of the right and authority of the Federal Government, under and in connection with the ownership and use of the public lands, is vested in the Congress of the United States, and that neither the Executive Department of the United States, or any representative or member of the Executive Department of the United States, has any power, authority or jurisdiction whatsoever over any of the public lands of the United States, except as expressly authorized by an act of the Congress of the United States conferring such power and authority upon such Executive officer.

The defendant further alleges and claims:

a. That after the admission of the State of Utah into the Union on an equal footing with the original states, the Congress had no power, under the Constitution of the United States, to prevent the appropriation of water, or the construction, maintenance or use of reservoirs, flumes or conduits, or other works or structures, essential to or properly connected with any of the public or other beneficial uses of water, or upon or in connection with the public lands of the United States.

b. That the Statutes of the State of Utah, hereinbefore mentioned, were valid, and are valid and enforceable, and not in conflict with

the Constitution of the United States, or any power thereby conferred upon Congress.

c. That the Acts of Congress approved March 3, 1891, January 21, 1895, May 14, 1896, May 11, 1898, February 15, 1901, and February 1, 1905, did not, nor did any other act or acts of Congress supersede, modify, or in any way affect Sections 2339 or 2340 of the Revised Statutes, or confer upon the Secretary of the Interior, or the Secretary of Agriculture, any power to prevent the appropriation of water, or the construction, maintenance or operation of reservoirs, flumes, or conduits, or other works or structures, for or properly connected with the beneficial use of the waters of the State of Utah, or any other state.

d. That if any of the acts of Congress herein mentioned, or any other act of Congress, were interpreted to prevent, or to confer upon the Secretary of the Interior, or the Secretary of Agriculture, the power to prevent the construction or maintenance of reservoirs, flumes, or conduits, or any of the power  
56 houses, transmission lines, or other structures or works necessary to the appropriation and beneficial use of water, and the distribution and beneficial use of the electric power generated thereby, such act of the Congress would be unauthorized by and in conflict with Article IV of Section 3, and the Fifth and Tenth Amendments of the Constitution of the United States, and void.

e. That the Congress has no power to compel, and has not conferred, or attempted to confer upon the Secretary of the Interior, or the Secretary of Agriculture, the power to compel the defendant to comply with the regulations herein mentioned, or enter into any special use agreement, or to prevent or interfere with the maintenance, operation or use of the reservoirs, flumes, or conduits, power houses, transmission lines, or other works or structures, referred to in the bill of complaint herein.

Wherefore: Defendant prays that plaintiff take nothing by virtue of its complaint, and that the defendant have such relief as may be agreeable to equity, and be hence dismissed with its costs.

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Filed November 23, 1914.

JERROLD R. LETCHER, *Clerk.*

## Department of the Interior.

*Regulations Concerning Rights of Way Through the Public Lands and Reservations of the United States (Except National Forests) and the Yosemite, Sequoia, and General Grant National Parks, California, for Power Purposes, under the Act of February 15, 1901 (31 Stat., 790). Approved March 1, 1913.*

[Coat of arms Department of the Interior.]

Washington, Government Printing Office, 1913.

- 58 *Regulations Concerning Permits for Rights of Way for Power Purposes through Public Lands and Reservations (Except National Forests).*

## General Statement.

1. The act of February 15, 1901, chapter 372 (31 Stat., 790), entitled "An act relating to rights of way through certain parks, reservations, and other public lands," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of the said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: Provided, further, That all permits given hereunder for telegraph and telephone purposes shall be subject

to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: And provided further, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

2. This act, in general terms, authorizes the Secretary of the Interior, under regulations to be fixed by him, to grant permission to use rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks in California, for every purpose contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095, 1101), and by acts of January 21, 1895 (28 Stat., 635), May 14, 1896 (29 Stat., 120), and May 11, 1898 (30 Stat., 404), and for other purposes additional thereto, except for tramroads, the provisions relating to tramroads, contained in the act of 1895 and in section 1 of the act of 1898, aforesaid remaining unmodified and not being in any manner extended.

59 3. Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way contained in the acts referred to, yet in view of the general scope and purpose of the act, and of the fact that Congress has, with the exception above noted, embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that, for purposes of administration, the later act should control in so far as it pertains to the granting of permission to use rights of way for purposes therein specified. Accordingly, all applications for permission to use rights of way for the purposes specified in this act must be submitted thereunder. Where, however, any canal or ditch company formed for the purpose of irrigation, any individual, or association of individuals, seeks to acquire a right of way for irrigation canals, ditches, or reservoirs, under said sections of the act of March 3, 1891, and section 2 of the act of May 11, 1898, *supra*, the application must be submitted in accordance with the regulations issued under said acts.

4. By section 1 of the act of February 1, 1905 (33 Stat., 628), it is provided:

That the Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands.

5. Under this section it has been determined that the Depart-

ment of Agriculture is invested with jurisdiction to pass upon all applications under the said act of February 15, 1901, for permission to occupy and use lands in national forests.

6. Therefore when it is desired to obtain permission to use a right of way over public lands within a national forest, an application should be prepared in accordance with the regulations issued by the Department of Agriculture and the same submitted to the proper officer of that department, as in these regulations more fully set forth.

7. Any occupancy or use of public lands, reservations, parks, or national forests for the purposes set forth in the statute, except under authority first secured from the proper department, is trespass.

8. The statute does not make a grant in the nature of an easement, but authorizes a mere permission revocable at any time, and it gives no right whatever to take from public lands, reservations, parks, or national forests adjacent to the right of way any material, earth, or stone for construction or other purpose.

9. Permission may be given under this statute for rights of way through unsurveyed as well as surveyed lands.

10. Public lands of the United States chiefly valuable for power purposes are from time to time withdrawn from settlement, location, sale, or entry and reserved for power purposes under the withdrawal act of June 25, 1910 (36 Stat., 847), as amended by act of August 24, 1912, (37 Stat., 497), or under sections 13 and 14 of the omnibus Indian act of June 25, 1910 (36 Stat., 855). Such reservation not only effects retention of the lands in Government ownership, but relieves the eventual permittee from the necessity of dealing with the numerous patentees or claimants that would

60 otherwise succeed to the ownership, and provides for a more permanent right of way than could otherwise be secured from the United States under existing law. On approval of a power project under the following regulations, modification of the withdrawal to allow the issuance of the necessary permit is secured, so that the withdrawal in no way interferes with power development. It is suggested, therefore, that prospective applicants under these regulations furnish to the Director of the Geological Survey, Washington, D. C., at the earliest possible stage of operations an approximate description by legal subdivisions of the land affected, together with a brief statement of the extent of the power resources involved and a request that a withdrawal be made. Such requests will be given immediate attention to the end that the unreserved lands affected may be withdrawn in so far as they are found to possess value for power purposes.

11. The following regulations govern the issuance of permits under the said act of February 15, 1901, that involve the use of or interference with valuable power resources or that involve rights of way for the development, transmission, or use of power. They are a revision of and supersede regulations on the same subject, approved August 24, 1912, which superseded sections 37-45, inclusive, of the "Regulations concerning right of way over public

lands and reservations for canals, ditches, and reservoirs, and use of right of way for various purposes," approved June 6, 1908 (36 L. D., 579-583), so far as they relate to permits that involve the use of or interference with valuable power resources or that involve rights of way for the development, transmission, or use of power. Permits under said act that do not involve the use of or interference with valuable power resources and that do not involve rights of way for the development, transmission, or use of power are issued in accordance with the said sections of the regulations of June 6, 1908.

### *Regulations.*

Regulation 1. Preliminary power permits issued by the Secretary of the Interior allow the occupancy of the public lands and reservations of the United States (except national forests) and of the Yosemite, Sequoia, and General Grant National Parks, all hereinafter called "Interior Department lands," for the purpose of securing the data required for an application for final permit. Final power permits issued by the Secretary of the Interior allow the occupancy and use of Interior Department lands for the construction, maintenance, and operation of works that involve the use of or interference with valuable power resources or that involve the development, transmission, or use of power. All permits will be issued, extended, renewed, or revoked only by the Secretary of the Interior, hereafter in these regulations called "the Secretary."

Reg. 2. Application for preliminary or final power permits for occupancy or use of lands of the United States should be submitted as follows:

For Interior Department lands: To the local land office of the land district in which the lands are situated. If the lands are situated in more than one district, the lands in both districts shall be embraced in one set of application papers, which shall be submitted in any one of such districts at the option of the applicant, who shall submit to the local land office in each of the  
61 other districts a print copy of the maps submitted to the local land office of the first district.

For national forest lands: To the district forester of the district in which the lands are situated, unless otherwise directed by the regulations of the Department of Agriculture.

For lands in part national forest land and in part Interior Department lands: In the same manner as for national forest lands, but the applicant shall also submit to the local land office in the land district in which the Interior Department lands are situated such maps and papers and copies thereof as are required in these regulations.

Reg. 3. Priority of consideration of applications for final power permits shall be initiated in the order of filing complete applications whether such applications shall be for preliminary permit as prescribed in regulation 10 or for final permit as prescribed in either regulation 11 or regulation 12. If a preliminary permittee



shall file such complete application for final permit before loss of priority initiated by the application for preliminary permit, the priority so initiated shall be maintained by the application for final permit and be effective as of the date of the application for the preliminary permit. Priority shall be maintained, however, only in so far as the projects shown in the application for final permit are within the approximate limits of diversion and discharge as shown in the application for the preliminary permit. Priority initiated or maintained by an application for final permit shall be lost if the applicant fails to make the payment required and to return a duly executed agreement, as prescribed in regulation 14 or in regulation 15, within 90 days from a date fixed in the letter transmitting such agreement to him, unless a longer time is allowed by written authority of the Secretary. Priority initiated by an application for preliminary permit shall be lost: (1) if the initial payment is not made within 60 days of demand therefor; or (2) if the application for final permit is not filed within the time required in the preliminary permit. Priority initiated or maintained by an application for a permit shall be lost if the permit is revoked. No other application either preliminary or final, for a like use covering in whole or in part the same or adjacent lands, will be accepted from the permittee whose priority is lost until the expiration of one year thereafter; and this restriction shall extend to transferees of the permittee and, if the permittee is a corporation, to reincorporations representing the same or associated interests, whenever in the judgment of the Secretary a transfer or reincorporation has been effected for the purpose or with the result of escaping the restriction of this regulation, it being the intent of such restriction to leave open to other applicants for a period of one year power sites upon which priorities have lapsed as provided in this regulation.

Reg. 4. Final power permits will be issued only in case it appears that the proposed development will be in general accord with the most beneficial utilization of the resources involved and consistent with the public interest. No final power permit will be issued if the works to be constructed thereunder would in any way be incompatible with works operated or constructed or to be constructed under an existing final power permit. No final power permit will be issued for the construction of works within an area covered by a prior preliminary permit until after the filing of final  
62 application or the loss of priority by the prior preliminary permittee. Applications for final power permits involving in whole or in part the same lands will be examined in order of their priority, but before the issuance of final permit consideration may be given, in the discretion of the Secretary, to the financial ability and business connections and affiliations of the applicants. Successive preliminary permits may be issued covering the same power site, but in each successive preliminary permit it shall be specified that such permit is subordinate to all outstanding prior permits and shall not adversely affect any rights thereunder.

Reg. 5. The applicant must file as a part of his application the

evidence of initiation of water appropriation in these regulations hereafter required. Thereafter no protest against the issuance of a permit, if based upon alleged lack of water rights, will be considered; nor, in general, will any allegation that the time of beginning or completion of construction has been or is delayed by litigation over water rights be accepted as a sufficient reason for granting any extensions of time. Wherever the approval or permission of one or more State agencies is required by the State law as a condition precedent to the applicant's right to construct or operate or to take or use water in the operation of the works described in any application for a final power permit, duly certified evidence, in duplicate, of the approval or permission so required must be filed before issuance of such permit.

Reg. 6. Unless sooner revoked by the Secretary, a final power permit shall terminate at the expiration of 50 years from the date of the permit. If, however, at any time not less than 2 nor more than 12 years prior to the termination of the permit, the permittee shall formally notify the Secretary that he desires a new permit to occupy and use such lands as are occupied and used under the existing permit, and will comply with all then existing laws and regulations governing the occupancy and use of lands of the United States for power purposes, the existing permit will be considered as an application for such new permit.

Reg. 7. The following terms, wherever used in these regulations, shall have the meaning hereby in this regulation assigned to them, respectively, viz:

"Municipal purposes" means and includes all purposes within municipal powers as defined by the charter of the municipal corporation, where any such purpose is directly pursued by the municipal corporation itself with the primary object of promoting the security, health, good government, or general convenience of its inhabitants.

"Power business" means the entire business of the applicant or permittee in the generation, distribution, and delivery of power by means of any one power system, together with all works and tangible property involved therein, including freeholds and leaseholds in real property.

"Power system" means all interconnected plants and works for the generation, distribution, and delivery of power.

"Power project" means a complete unit of power development, consisting of a power house, conduit or conduits conducting water thereto, all storage or diverting or fore-bay reservoirs used in connection therewith, the transmission line delivering power therefrom, any other miscellaneous structures used in connection with said unit or any part thereof, and all lands the occupancy and use of which are necessary or appropriate in the development of power in said unit.

63 "Project works" means the physical structures of a power project.

"Construction of the project works" means the actual construction of dams, water conduits, power houses, transmission lines, or some permanent structure necessary to the operation of the complete

power project, and does not include surveys or the building of roads and trails, or the clearing of reservoir sites or other lands to be occupied, or the performance of any work preliminary to the actual construction of the permanent project works.

"Operation period" means the period covered by final permit subsequent to the actual beginning of operation.

"Survey-construction period" means the period covered by preliminary and final permits prior to the operation period.

"Nominal stream flow" means the sum of (a) the average of the values estimated for the mean natural flow for the two-month (calendar) minimum-flow period in each successive five-year cycle or major fraction thereof, and (b) the increase in such average due to artificial means other than the project works.

"Project storage flow" means the estimated increase in nominal stream flow made practicable by the project works.

"Available stream flow" means the sum of nominal stream flow and project storage flow.

"Load factor" means the ratio of average power output to maximum power output.

"Total capacity of the power site" means the power estimated to be available for transmission, and is determined as the continued product of (1) the factor 0.08<sup>1</sup>; (2) the average effective head, in feet; (3) the available stream flow at the intake (in second-feet and in amount not to exceed the maximum hydraulic capacity of the project works); and (4) a factor, not less than the average load factor of the power system, representing the degree of practicable utilization of the available stream flow, and based on the extent of practicable fore-bay storage and the load factor of the power system.

"Net capacity of the power site" means the capacity on which the calculation of the compensation hereinafter required to be paid is based, and is determined by making a deduction from the total capacity of the power site which, in per cent, shall be the product of the square of the distance of primary transmission in miles and the factor 0.001, but in no case shall such deduction exceed 25 per cent.

Reg. 8. The occupancy and use of Interior Department lands (otherwise than by transmission lines) under a preliminary or final power permit for power sites of more than 100 horsepower total capacity (except permits exclusively for municipal purposes, for irrigation, or for temporary construction or project works as in this regulation hereafter specified) will be conditioned on the payment in advance for each calendar year of compensation calculated from the "net capacity of the power site," as defined in regulation 7, at not less than the following rates per horsepower per year:

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<sup>1</sup>The factor 0.08 represents the horsepower at 70 per cent efficiency of a second-foot of water falling through a head of 1 foot.

For the unexpired portion of the calendar year and for the first full calendar year of the survey-construction period, and similarly for the operation period.....	\$0.01
For the second full calendar year of each of said periods.....	.02
For the third year.....	.03
For the fourth year.....	.04
64 For the fifth year.....	0.05
For the sixth year.....	.06
For the seventh year.....	.07
For the eighth year.....	.08
For the ninth year.....	.09
For the tenth and each succeeding year.....	.10

The rates per horsepower per year will be ten times such minimum rates, however, unless good cause for fixing other rates appears.

The occupancy and use of Interior Department lands by transmission lines will be conditioned on the payment in advance for each calendar year of compensation to be fixed by the Secretary and specified in each permit according to the circumstances in each case.

The compensation on account of a preliminary power permit will be calculated from the net capacity of the power site as estimated by the Secretary at the time of granting such permit. The compensation on account of a final power permit will be calculated from the net capacity of the power site as estimated by the Secretary at the time of granting said final permit, provided that said estimated net capacity may be adjusted by the Secretary annually to provide for changes in length of primary transmission, for increase or decrease, by storage or otherwise, of available stream flow to an amount of 10 per cent or more, or for increase or decrease of 10 per cent or more in average effective head, or in degree of practicable utilization.

The first payment by every permittee shall be the compensation for a full year, but any excess of said payment over the pro rata compensation for the unexpired portion of the calendar year in which the permit is issued will be credited to the permittee as a part of his payment for the first full calendar year.

All payments made for the survey-construction period will be credited to the permittee for the cancellation of charges as they become due in the operation period.

No compensation will be required for the occupancy and use of Interior Department lands under a preliminary or final power permit authorizing such occupancy and use exclusively for municipal purposes, for irrigation, or for the temporary development of power to be used in the construction of permanent project works under permit issued to the same permittee. All free permits issued under this paragraph will be subject to such special conditions as the Secretary may deem necessary in each case to fully protect the consumers of power for such municipal purposes and irrigation.

If all or any part of the amounts due for compensation as required in the preliminary permit shall, after due notice has been given, be in arrears for 60 days, then and thereupon the preliminary permit shall terminate and be void and will be formally revoked by the

Secretary. If all or any part of the amounts due for compensation, as required in the final permit, shall, after due notice has been given, be in arrears for six months, then and thereupon the final permit shall terminate and be void and will be formally revoked by the Secretary.

At any time not less than 10 years after the issuance of final permit, or after the last revision of rates per horsepower per year thereafter, the Secretary may review such rates and impose such new rates per horsepower per year as he may decide to be reasonable and proper: Provided, That the new rates shall not be so great as to result in reducing the margin of income from the project over estimated and proper expenses (including reasonable allowance for repairs and renewals) to an amount which, in view of all the circumstances (including fair promotion costs and working capital) and risks of the enterprise (including obsolescence), is unreasonably small; but the burden of proving such unreasonableness shall rest upon the permittee.

The decision of the Secretary shall be final as to all matters of fact upon which the calculation of the capacities or compensation depends.

Reg. 9. All applications for power permits, whether preliminary or final, to occupy and use Interior Department lands under these regulations shall, if the applicant be an individual, be accompanied by an affidavit by the applicant that he is a citizen of the United States. If he is not a native-born citizen he must submit the usual proofs of naturalization. If the applicant is an association of citizens, each member must make affidavit of citizenship, and a complete list of the members must be given in an affidavit by one of them. Associations must, in addition, submit their articles of association; if there be none, the fact must be stated over the signature of each member of the association. Applications by individuals or associations must also be accompanied by the information called for in paragraph (G) of this regulation.

If the applicant is an incorporated company, its application must be accompanied by the papers below in this regulation specified:

(A) A copy of its articles of incorporation, duly certified by the proper officers of the company under its corporate seal or by the secretary of the State where organized.

(B) A copy of the State law under which the company was organized (if it was organized under State law), with certificate of the governor or secretary of the State, under seal, that the same was the law at the date of incorporation. (See par. (H) of this regulation.)

(C) If the State law directs that the articles of incorporation or other papers connected with the organization be filed with any State officer, there must be submitted the certificate of such officer that the same have been filed according to law, and giving the date of the filing thereof.

(D) When a company is operating in a State other than that in which it is incorporated, it must submit the certificate of the proper officer of the State that it has complied with the laws of that State



governing foreign corporations to the extent required to entitle the company to operate in such State.

(E) An official statement, by the proper officer, under the seal of the company, that the organization has been completed, that the company is fully authorized to proceed with construction according to the existing law of the State in which it is incorporated, and that the copy of the articles filed is true and correct.

(F) A true list, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the items by this regulation required.

(G) A copy of the State laws governing water rights, with the certificate of the governor or secretary of the State that the same is the existing law.

(H) If certified copies of the existing laws regarding corporations and irrigation, and of new laws as passed from time to time, be forwarded to the General Land Office by the governor or secretary of the

66 State, the applicant may file, in lieu of the requirements of paragraphs (B) and (G) of this regulation, a certificate of the governor or secretary of state, under seal, that no change has been made since a given date, not later than that of the laws last forwarded.

Reg. 10. All applications for preliminary permits to occupy and use Interior Department lands for the purpose of securing the data required for an application for final permit for power projects of more than 100 horsepower total capacity shall consist of the following items (in addition to those specified in regulation 9), each of which shall be dated and signed by the applicant:

(I) An application in quadruplicate, on Form 3.

(J) A map, in duplicate, on tracing linen, and two print copies, cut to a uniform size and not larger than 28 by 40 inches and not smaller than 24 by 36 inches, with scale so selected as to show upon a single map the power project or projects applied for, showing the approximate location of the dams, reservoirs, conduits, power houses, and other project works. The map shall show: All lines of public land subdivisions by official survey and the protractions on unsurveyed lands of section and township lines, such protractions in any national forest conforming to the diagram accompanying the proclamation establishing the boundaries of such national forest; for each reservoir site, the distance and bearing of one extremity of the dam from the nearest existing corner of the public survey and approximately the position of the maximum-flow line; and for each water-conduit line, the distance and bearing of each terminus from the nearest existing corner of the public survey and the approximate location of the conduit. If on unsurveyed land, the distances and bearings may be taken from a permanent mark on some natural object or permanent monument that can be readily found and recognized.

(K) Estimates in quadruplicate for each power project of (1) the total average effective head to be utilized, and the per cent thereof to be obtained from dam and from water conduit, respectively; (2) the



stream flow, and the per cent thereof to be made available from storage by the project works and by other works, respectively; (3) the area to be flooded by backwater from the diversion dam; (4) the length of the proposed water conduit (from intake to tailrace outlet); (5) the area and available capacity of each proposed storage reservoir; (6) the probable load factor of the power system; and (7) the distance, in miles, of proposed primary transmission.

These estimates should be accompanied by complete statements in detail of all data on which they are based, including stream measurements, rainfall, stream flow and evaporation records, drainage areas, probable points of delivery of power, and any other pertinent information.

(L) A duly certified copy of such notice or application, if any, as is required to be posted or filed, or both, to initiate the appropriation of water under the local laws. This notice or application should provide for use, by the applicant for a power permit or by his predecessors, of sufficient water for the full operation of the project works.

Application must be made for the occupancy and use of such lands for a definite, limited period only, which period will allow a reasonable time for the preparation and filing of the final application as prescribed in regulation 11. The time prescribed in the preliminary permit may, upon application, be extended by the Secretary if the completion of the final application has been prevented by  
67 unusual climatic conditions that could not reasonably have been foreseen or by some special or peculiar cause beyond the control of the permittee.

An application for a preliminary power permit shall not be complete until every map or paper required by regulation 9 and by this regulation shall have been filed in the form prescribed.

Reg. 11. All applications for final permits to occupy and use Interior Department lands for power projects of more than 100 horsepower total capacity shall consist of the following items (in addition to those specified in regulation 9):

(I) An application in quadruplicate, on Form 5.

(J) Maps of location, in duplicate, on tracing linen, and plans of structures on tracing linen, with two print copies of each map and plan cut to uniform size not larger than 28 by 40 inches and not smaller than 24 by 36 inches with graphical scale not less than 6 inches in length drawn thereon. Separate sheets, numbered consecutively, shall be used for maps whenever the whole survey can not be shown upon a single sheet, and each sheet shall contain a small diagram showing the entire map and indicating the portions shown on each sheet. Each separate sheet of maps and plans shall contain an affidavit of the applicant's engineer and a certificate of the applicant in form prescribed by the Secretary. (See Form 6.) The maps shall show reference lines that can at all times readily be retraced to initial points of survey, to termini of water conduits, to termini of transmission lines (when within 2 miles of Interior Department lands, measured along the proposed right of way), and to intersections of surveys with boundaries of national forests and other

reservations of the United States; all lines of public land subdivisions by official survey and the protractions on unsurveyed lands of section and township lines, such protractions in any national forest conforming to the diagram accompanying the proclamation establishing the boundaries of such national forest; and the status as to ownership of all lands of the power project or projects, designating separately lands patented, lands of the United States entered or otherwise embraced in any unperfected claim under the public-land laws, unreserved lands of the United States, and, separately for each reservation, lands included within national forests and other reservations of the United States. Elevations and contour lines shall be based on United States Geological Survey datum whenever available.

(1) The following maps and plans shall be submitted for each reservoir that will be a part of the power project or projects applied for: (a) A contour map of each reservoir site, dam, and dam site on a scale of not more than 400 feet to the inch, with a contour interval of not more than 10 feet. The contour map for each reservoir site shall show the high-water flow line and, in case the reservoir is to be used in whole or in part for diversion purposes, the flow line fixed by the estimated average effective head, and also a table of areas and capacities for each flow line and each contour line. (b) A cross section of each dam site along the center line of the proposed dam, with a graphical log properly located thereon of each boring, test pit, or other exploration, and a brief statement of the character and dip of underlying material. (c) Plans, elevations, and cross sections of the dams, showing spillways, sluiceways, or sluice pipes, and other outlet works; and also a statement of the volume of the dam, the character of the materials used, and the type of construction.

68 (2) The following maps and plans shall be submitted for the entire length of each water conduit, from intake to tail-race outlet, that will be a part of the power project or projects applied for: (a) A contour map of the entire water-conduit location, except pipe lines and tunnels, on a scale of not more than 400 feet to the inch, with contour interval of not more than 10 feet and a profile of the pipe lines and tunnels. The contours shall cover either an area of 100 feet in width on each side of the center line of the water conduit or a difference in elevation of at least 25 feet above and below the grade line of the conduit. This map shall show the transit line of the survey and the center line of the proposed final location of the water conduit, including curves between tangents, and the distance from the nearest section or quarter-section corner of the intersection of the transit line with section lines. This map shall also show what sections of the water conduit will be in flume, ditch, tunnel, pipe, etc., and the grade of each section. (b) Plans, elevations, and cross sections of each type of water conduit, showing material, dimensions, grades, flow line, and capacity and plans and elevations of intake works and fore bays.

(3) A contour map on a scale of not more than 50 feet to the inch, with a contour interval of not more than 5 feet, showing the proposed location of the power house, other buildings, etc., shall be

filed for each power-house site that will be a part of the power project or projects applied for. This map shall also state the proposed type and estimated number and rated capacity of the water wheels and generators to be used.

(4) A map of the survey of the proposed final location of the center line of the transmission line, on a scale of not more than 1,000 feet to the inch, shall be filed for such portion of the transmission lines as are located upon Interior Department lands.

(5) A general map of the entire power project or projects applied for (except transmission lines), on such a scale that the entire survey may be shown upon a single sheet; also a similar map showing the entire primary transmission system.

(K) Copies of field notes in triplicate of the entire final location survey of water conduits and transmission lines and the exterior boundaries of power-house and reservoir sites, bearing an affidavit of the applicant's engineer and a certificate of the applicant in form prescribed by the Secretary. (See Form 7.)

(L) Estimates in quadruplicate for each power project of (1) the total average effective head to be utilized and the per cent thereof to be obtained from dam and from water conduit, respectively; (2) the stream flow and the per cent thereof made available from storage by the project works and by other works, respectively; (3) the area to be flooded by the dam below the flow line fixed by the estimated average effective head; (4) the length of the proposed water conduit (from intake to tailrace outlet); (5) the area and available capacity of each proposed storage reservoir; (6) the available storage capacity of fore bay (or diversion pond); (7) the probable load factor of the power system; and (8) the distance, in miles, of primary transmission.

These estimates should bear an affidavit of the applicant's engineer and a certificate of the applicant (Form 8), and should be accompanied by complete statements in detail of all data on which  
69 they are based, including stream measurements, rainfall, stream flow, and evaporation records, drainage areas, total static head and losses in head, probable maximum, minimum, and average power output, load curves of the power system, efficiencies of machinery, probable points of delivery of power, and all other pertinent information.

(M) Such evidence of water appropriation as is specified in regulation 10 (L). If such evidence has been filed with an application for a preliminary permit, only such additional evidence will be required as will cover appropriations or transfers subsequent to the date of the evidence filed with the application for preliminary permit. A certified statement from the proper State agency setting forth the extent and validity of the applicant's water right, if consistent with the State law, must also be filed together with the evidence required by regulation 5, or a showing of cause why such evidence can not reasonably be presented.

(N) A detailed statement in quadruplicate by the applicant of the time desired for making financial arrangements, for completing

preliminary construction, and for beginning "construction of the project works," as defined in regulation 7.

Maps and field notes shall designate by termini and length each water-conduit and transmission line, and by initial point and area each reservoir and power-house site. The termini of water conduits, the termini of transmission lines, and the intersections with boundaries of reservations of the United States and with surveyed township and section lines, and the initial point of survey of power-house sites shall be fixed by reference by course and distance to the nearest existing corner of the public survey; and the initial point of the survey of reservoir sites shall be fixed by reference by course and distance to the nearest existing corner outside of the reservoir by a line or lines not crossing an area that will be covered with water when the reservoir is in use. When any such terminus, intersection, or initial point is upon unsurveyed land, it shall be connected by traverse with an established corner of the public survey, and the distance from the terminus, intersection, or initial point to the corner shall be computed and noted on the map and in the affidavit of the applicant's engineer. When the nearest established corner of the public survey is more than 2 miles distant, this connection may be with a permanent mark on a natural object or a permanent monument which can be readily found and recognized. The field notes shall give an accurate description of the natural object or monument and full data of traverse as required above.

Each separate original map, plan, set of field notes, estimates, and data, evidence of water appropriation, articles of incorporation, and evidence of right to operate within any State shall be plainly marked "Exhibit A," "Exhibit B," etc., respectively, and referred to by such designation in the application. Maps and plans shall in addition be described in the application by their titles as "Exhibit A, map of location of," etc., "Exhibit B, plan of," etc. Duplicate and triplicate copies, etc., should be marked "Exhibit A, duplicate," "Exhibit A, triplicate," etc. Maps should be rolled for mailing and should not be folded.

An application for final permit shall not be complete until every map or paper required by this regulation has been filed in the form prescribed.

70 Reg. 12. No application will be received for preliminary permits for the occupancy and use of Interior Department lands for power projects of 100 horsepower total capacity or less. Applications for final permits for such occupancy and use shall be in writing, dated and signed by the applicant, and, in addition to the items specified in regulation 9, shall be accompanied by:

(J) A map in quadruplicate showing the location of dams, reservoirs, conduits, power houses, and transmission lines or other works.

(K) Field notes of the survey in quadruplicate.

(L) A statement in quadruplicate of the amount of water to be diverted for use, the maximum capacity of the diversion works, and the total average static and effective heads to be utilized.

(M) Such showing as is specified in regulation 11 (M).

The map shall consist of duplicate originals on tracing linen and

two print copies, and shall not be larger than 28 by 40 inches or smaller than 24 by 36 inches, and may be on any convenient scale. The map shall show all lines of public-land subdivisions by official survey and the protractions on unsurveyed lands of section and township lines, such protractions in any national forest conforming to the diagram accompanying the proclamation establishing the boundaries of such national forest; and the status as to ownership of all lands in the power project, designating separately lands patented, lands of the United States entered or otherwise embraced in any unperfected claim under the public-land laws, unreserved lands of the United States, and, separately for each reservation, lands included in national forests and other reservations of the United States. The map shall also show: For each reservoir site, the distance and bearing of the initial point of survey from the nearest existing corner of the public survey, the location of the maximum-flow line, and the area and available storage capacity of the reservoir; for each water-conduit line, the distance and bearing of each terminus from the nearest corner of the public survey, the location of the center line of the conduit, and its length; and for each power-house site, the distance and bearing of the initial point of survey from the nearest corner of the public survey, the location of the exterior boundaries of the site, and the area. If on unsurveyed land, the distances and bearings may, if the nearest existing corner of the public survey is more than 2 miles distant, be taken from a permanent mark on some natural object or permanent monument that can be readily found and recognized.

Reg. 13. Before a final power permit will be issued for a power project of 100 horsepower total capacity or less, the permittee shall execute or file an agreement which, upon its approval in writing by the Secretary, shall constitute and express the conditions of the permit. Such agreement shall expressly bind the applicant to such of the items enumerated in regulation 14 and such other conditions as may be required by the Secretary.

Reg. 14. Before a final power permit will be issued for a power project of more than 100 horsepower total capacity, the permittee shall execute and file an agreement which, upon its approval in writing by the Secretary, shall constitute and express the conditions of the permit. Such agreement shall expressly bind the applicant—

(A) To construct the project works on the location shown upon and in accordance with the maps and plans submitted with the final application for permit, and to make no material deviation  
71 from said location unless and until maps and plans showing such deviation shall have been submitted and approved. (See regulation 15.)

(B) To begin the construction of the project works, or the several parts thereof, within a specified period or periods from the date of execution of the permit, and thereafter to diligently and continuously prosecute such construction unless temporarily interrupted by climatic conditions or by some special or peculiar cause beyond the control of the permittee.

(C) To complete the construction and begin the operation of the



project works, or the several parts thereof, within a specified period or periods from the date of execution of the permit.

(D) To operate the project works continuously for the development, transmission, and use of power, unless upon a full and satisfactory showing that such operation is prevented by unavoidable accidents or contingencies this requirement is temporarily waived by the written consent of the Secretary.

(E) To pay annually, in advance, such amounts as may be fixed and required by the Secretary under these regulations. (Regulation 8.)

(F) On demand of the Secretary to install at such places and maintain in good operating condition in such manner as shall be approved by the Secretary accurate meters, measuring weirs, gauges, or other devices approved by the Secretary and adequate for the determination of the amount of electric energy generated by the project works and of the flow of the stream or streams from which the water is to be diverted for the operation of the project works and of the amount of water used in the operation of the project works and of the amounts of water held in and drawn from storage; to keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Secretary; and to make a return during January of each year, under oath, of such of the records of measurements for the year ended on December 31, preceding, made by or in the possession of the permittee, as may be required by the Secretary.

(G) That the books and records of the permittee shall be open at all times to the inspection and examination of the Secretary, or other officer or agent of the United States duly authorized to make such inspection and examination.

(H) On demand of the Secretary to install a system of accounting for the entire power business in such form as the Secretary may prescribe, which system as far as is practicable will be uniform for all permittees, and to render annually such reports of the power business as the Secretary may direct: Provided, however, That if the laws of the State in which the power business or any part thereof is transacted require periodical reports from public utility corporations under a uniform system of accounting, copies of such reports so made will be accepted as fulfilling the requirements of this clause.

(I) To protect all Government and other telephone, telegraph, and power transmission lines at crossings of and at all places of proximity to the permittee's transmission line in a workmanlike manner according to the usual standards of safety for construction, operation, and maintenance in such cases, and to maintain transmission lines in such manner as not to menace life or property.

(J) To clear and keep clear the Interior Department lands along the transmission line for such width and in such manner as the officer of the United States having supervision of such lands may direct.

72. (K) To dispose of all brush, refuse, or unused timber on

Interior Department lands resulting from the construction and maintenance of the project works to the satisfaction of the officer last aforesaid.



(L) To build and repair such roads and trails as may be destroyed or injured by construction work or flooding under the permit, and to build and maintain necessary and suitable crossings for all roads and trails that intersect the water conduit constructed, maintained, or operated under the permit.

(M) To do everything reasonably within the power of the permittee both independently and on request of the Secretary or other duly authorized officer or agent of the United States to prevent and suppress fires on or near the lands to be occupied under the permit.

(N) To pay the full value as fixed by the Secretary for all timber cut, injured, or destroyed on Interior Department lands in the construction, maintenance, and operation of the project works.

(O) To pay the United States full value for all damage to the lands or other property of the United States resulting from the breaking of or the overflowing, leaking, or seeping of water from the project works, and for all other damage to the lands or other property of the United States caused by the neglect of the permittee or of the employees, contractors, or employees of the contractors of the permittee.

(P) To indemnify the United States against any liability for damages to life or property arising from the occupancy or use of Interior Department lands by the permittee.

(Q) To sell power to the United States, when requested, at as low a price as is given to any other purchaser for a like use at the same time, and under similar conditions, if the permittee can furnish the same to the United States without diminishing the quantity of power sold before such request to any other customer by a binding contract of sale: Provided, That nothing in this clause shall be construed to require the permittee to increase permanent works or install additional generating machinery.

(R) To abide by such reasonable regulation of the service rendered and to be rendered by the permittee to consumers of power furnished or transmitted by the permittee, and of the prices to be paid therefor as may from time to time be prescribed by the State or any designated agency of the State in which the service is rendered: Provided, That for the purposes of this paragraph any such regulation shall be deemed to be suspended pending proceedings in the courts of such State, or in the Supreme Court of the United States on appeal from said State courts where such proceedings are in the nature of an appeal taken direct from the officer, commission, or board prescribing such regulation to said State courts.

(S) Upon demand in writing by the Secretary to surrender the permit to the United States or to transfer the same to such State or municipal corporation as he may designate, and to give, grant, bargain, sell, and transfer with the permit all works, equipment, structures, and property then owned or held by the permittee on lands of the United States occupied or used under the permit, and then valuable or serviceable in the generation, transmission, and distribution of power: Provided, (1) That such surrender or transfer shall be demanded only in case the United States or the transferee shall have first acquired such other works, equipment, structures, property and rights of the permittee as are de-

pendent in whole or in essential part for their usefulness upon the continuance of the permit; (2) that such surrender or transfer shall be on condition precedent that the United States shall pay or the transferee shall first pay to the permittee the reasonable value of all such works, equipment, structures, and property to be surrendered or transferred; (3) that such reasonable value shall not include any sum for any permit, right, franchise, or property granted by any public authority in excess of the sum paid to such public authority as a purchase price therefor; and (4) that such reasonable value shall be determined by mutual agreement of the parties in interest, and in case they can not agree, by the Secretary under a rule, which, except as modified by the requirements of this paragraph, shall be the then existing rule of valuation for power properties in condemnation proceedings in the State in which the properties to be surrendered or transferred are located. But nothing herein shall prevent the United States or any State or municipal corporation from acquiring by any other lawful means the permit or the works, equipment, structures, or property then owned or held by the permittee on lands of the United States occupied or used under the permit.

(T) That in respect to the regulation by any competent public authority of the service to be rendered by the permittee or the price to be charged therefor, and in respect to any purchase or taking over of the properties or business of the permittee or any part thereof by the United States, or by any State within which the works are situated or business carried on in whole or in part, or by any municipal corporation in such State, no value whatsoever shall at any time be assigned to or claimed for the permit or for the occupancy or use of Interior Department lands thereunder, nor shall such permit or such occupancy and use ever be estimated or considered as property upon which the permittee shall be entitled to earn or receive any return, income, price, or compensation whatsoever.

(U) That the works to be constructed, maintained, and operated under the permit will not be owned, leased, trustee, possessed, or controlled by any device or in any manner so that they form part of or in any way effect any combination in the form of an unlawful trust, or form the subject of any unlawful contract or conspiracy to limit the output of electric energy, or in restraint of trade with foreign nations or between two or more States, or within any one State in the generation, sale, or distribution of electric energy.

(V) That any approval of any alteration or amendment, or of any map or plan, or of any extension of time shall affect only the portions specifically covered by such approval; and that no approval of any such alteration, amendment, or extension shall operate to alter or amend, or in any way whatsoever be a waiver of any other part, condition, or provision of the permit.

(W) To perform such other specified conditions with respect to the occupancy and use of lands within any of said parks or any military, Indian, or other reservation as may be found by the chief officer of the department under whose supervision such park or reservation falls to be necessary as conditions precedent to the issuance

of the permit in order to render the same compatible with the public interest.

74 Reg. 15. During the progress of construction amendments to maps of location or plans of structures will be required from the permittee if there is a material deviation from the maps or plans as originally filed, but no amendment will be allowed that is incompatible with the occupancy and use of lands under existing permits or pending applications. Any approval of an amendment of a map or plan or of any extension of time shall be in the form of a supplemental agreement and permit so drawn as to become a part of the original agreement and permit and a substitute for the clauses amended. Any approval of any amendment of any map or plan shall apply only to the portions specifically covered by such approval, and no approval of any such amendment shall operate to amend or be in any way a waiver of any other part, condition, or provision of the permit.

If, after the completion of the project works, there are any deviations in location from those shown upon the original map or approved amendments thereof, additional maps prepared in the manner prescribed for original maps of location will be required to be filed within six months after the completion of the project works, showing the extent of such deviations and the final locations of such project works. Also upon the completion of the project works detailed working plans will be required of the works as constructed, except such parts as have been constructed in compliance with plans originally filed or approved amendments thereof. Such new or additional plans may be originals on tracing linen or Van Dyke negatives of the permittee's own working plans. The plans of conduits, dams, and appurtenant structures must be complete; of power houses, only general layout plans are required.

Reg. 16. An extension of the periods stipulated in the permit for beginning or completing construction and for beginning operation will be granted only by the written approval of the Secretary after a showing by the permittee satisfactory to the Secretary that the beginning or completion of construction and beginning of operation has been prevented by engineering difficulties that could not reasonably have been foreseen, or by other special and peculiar causes beyond the control of the permittee.

Reg. 17. A final permit may be transferred to a new permittee only (1) by a court of competent jurisdiction under a decree of foreclosure to enforce a mortgage or deed of trust that shall have been given in good faith to secure capital for the power business as defined in regulation 7, embracing the works constructed or to be constructed under such permit, and without any intent to evade the restrictions upon transfers in this regulation hereafter set forth; or (2) under the following conditions: The proposed transferee shall file with the Commissioner of the General Land Office, Washington, D. C., the decree, execution of judgment, will, proposed contract of sale, or other written instrument upon which the proposed transfer is based, or a properly certified copy thereof, also an application by the proposed transferee in the form of an agreement

binding the proposed transferee to the performance of such new and additional conditions expressed therein as the Secretary may deem necessary; and thereupon the Secretary may, in his discretion, approve in writing the proposed transfer, and after such approval the transferee shall succeed to all the rights and obligations of the permittee, subject, however, to such new and additional conditions as shall have been embodied in such agreement and so approved.

Reg. 18. If any person shall make a false engineer's affidavit under these regulations, the secretary may order that no map, field notes, plan, or estimate made by such persons shall be received or filed while the order is in force. If any person or corporation, for himself or itself, or as the attorney, agent, or employee of another, shall offer or file any map, field notes, plan, or estimate bearing a false engineer's affidavit, knowing the same to be false, the secretary may order that no application for a power permit shall be filed by or received from the person or corporation so offending, either in his or its own behalf or as attorney, agent, or employee of another, and that no power permit shall be issued to such person or corporation while the order is in force.

Reg. 19. Violation by a final permittee of any of the provisions of these regulations, or of any of the conditions of a permit issued to him thereunder, shall be sufficient ground for revocation of such permit; but attention is called to the statute under which these regulations are issued, which provides:

That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or by his successor in his discretion.

No permit will be deemed to be revoked except on the issuance by the Secretary of a specific order of revocation. Change of jurisdiction over lands from one executive department to another will not revoke but will change the administrative jurisdiction over a permit for the occupancy and use of such lands. The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provision of said act.

Reg. 20. Any power project under permit, or any part thereof, whether constructed or unconstructed, may be abandoned by the permittee upon the written approval of the Secretary after a finding by the Secretary that such abandonment will not tend to prevent the subsequent development of such project or part thereof so abandoned, and after the fulfillment by the permittee of all the obligations under the permit, in respect to payment or otherwise, existing at the time of such approval. Upon such abandonment, after such approval thereof and fulfillment of existing obligations, so much of the agreement and permit as relates to the abandoned project or part of a project will be formally revoked by the Secretary.

Reg. 21. When an original application for a preliminary or final permit for the use of Interior Department lands only is submitted to a local land office, notations will be made on the tract records of that office as to the fact of such application with respect to each tract affected, giving the serial number, the date of filing, the name of the applicant, and the character of the application or the act under which it is made. In addition to the regular filing stamp imprint on the accompanying papers the register will note on the original map, over his original signature, the serial number, date of filing, and a certificate that lands of the United States are affected indicating the mark or markings by which they are identified on the map. All the application papers will then be transmitted promptly to the General Land Office with report that the required notations have been made on the records of the local land office. When the application affects lands in more than one district, the register of the local land office to which is submitted only a print copy of the map, will make notations and transmit the print copy to the General Land Office in like manner.

If no land of the United States in a district is involved in the application, the officers of the local land office in that district will reject it, allowing the usual right of appeal.

During the pendency of an application for a permit, the local land officers will accept no filing with respect to any of the lands affected thereby except other applications for permits as provided in these regulations; but no valid right will be initiated by an applicant unless a permit is issued to him and said right shall then date from the completion of the application papers.

Upon receipt of the application papers at the General Land Office they will be registered and the pendency of the application will be noted on the tract records of that office in the manner hereinbefore specified for the local land offices. The General Land Office will examine the application and determine whether it is complete with respect to the requirements of that office; and will call upon the applicant through the local land office to supply any deficiency. Thereupon that office will promptly transmit the entire record to the Director of the Geological Survey, stating the fact of such completion and the date thereof as determined by the receipt at the local land office of the last paper required to be filed.

Upon receipt of the application for permit at the Geological Survey, that office will promptly call upon other offices for such reports and recommendations, in triplicate, with respect to the status of the lands, interference with matters under the jurisdiction of such offices, and conditions precedent to the issuance of the permit, as the nature of the case may require; and will determine whether the application papers are complete with reference to the requirements of the Geological Survey, and will call upon the applicant directly to supply any deficiency. When the application is found by the Geological Survey to be thus complete, the fact of such completion and the date thereof as determined by the receipt at the Geological Survey of the last paper required (or in case the ap-



plication is thus complete when received by the Geological Survey, the date as specified by the General Land Office) will be noted on the records of the Geological Survey; and said date will be taken as the date of initiation of priority as defined in regulation 3 and as the date of initiation of valid rights of the applicant as against other claimants, and will be so specified in the permit, if issued.

When an application for the use of national forest and Interior Department lands is submitted, the same procedure will be followed as in other cases, except that no draft of permit will be prepared until the Geological Survey receives notice from the Department of Agriculture of the fact and date of the completion of the application in that department. The date so notified will be taken as the date of initiation of priority as defined in regulation 3, but the initiation of valid rights of the applicant as against other claimants on Interior Department lands will date from the completion of the application in the Interior Department, and the respective dates will be so specified in the permit, if issued. In case

77 the application papers are found to be incomplete by the General Land Office or the Geological Survey, the office so finding will mail to the Department of Agriculture a copy of the letter calling upon the applicant to supply the deficiency; and the draft of the permit will be prepared by the Geological Survey only after consultation with the Department of Agriculture.

The recommendation of the Geological Survey, together with the two tracings of all maps of location, two sets of field notes, and two sets of the formal application papers required by regulation 9, shall be transmitted to the General Land Office, and that office will thereupon submit the case to the Secretary for action, presenting therewith its recommendation and that of the Geological Survey. In case the Geological Survey recommends that a permit be issued to the applicant that office will submit with its recommendation to the General Land Office a draft of such permit, in duplicate, together with two copies thereof and a draft of a letter to the applicant transmitting the permit to him for execution. After execution by the applicant and approval by the Secretary, the General Land Office will note the fact of such approval on the maps of location, will transmit one original of the permit to the permittee and one copy thereof to the Geological Survey, and will transmit one tracing of all maps of location, one set of field notes, and one copy of the permit to the local land office for filing, and will retain one original of the permit, one tracing of all maps of location, and one set of field notes in the files of the General Land Office. The approval of the permit and the dates of initiation of priority and of valid rights of the permittee will thereupon be noted on the tract records of the general and local land offices.

Matters of relative priority of applications under these regulations, incompatibility of works, relative beneficial utilization of resources, and the like, including all protests against the approval of applications on these grounds, shall be considered by the Geological Survey and covered by its recommendations.

After the issuance of the permit, the Geological Survey will make



such investigations and report to the Secretary as may be necessary for the determination and revision of rates and capacities, the supervision of construction and operation and of the records of the permittee as contemplated by these regulations, and, in general, for all engineering matters pertaining to the power development and the power resources involved. The compensation for the first year shall be transmitted by the applicant to the Secretary with the executed agreement prior to the issuance of the permit, in the form of a certified check to the order of the Secretary of the Interior, who, upon the issuance of the permit, will indorse the same to the order of the receiving clerk of the General Land Office for deposit to the credit of the Treasurer of the United States as "Sales of public lands."

Under the authority given by the said act of February 15, 1901 (c. 372, 21 Stat., 790), the foregoing regulations are, on this 1st day of March, 1913, hereby made and fixed with respect to applications and permits for rights of way under the said act for the development, transmission, and use of power through the public lands and reservations of the United States (except national forests) and the Yosemite, Sequoia, and General Grant National Parks, superseding the regulations approved August 24, 1912.

WALTER L. FISHER,  
*Secretary of the Interior.*

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## FORMS.

The following forms are prescribed for applications for permits under the act of February 15, 1901 (31 Stat., 790), in accordance with the foregoing regulations:

*Form 1. Official Statement of Organization.*

[See regulation 9 (E).]

I \_\_\_\_\_, secretary (or president) of the \_\_\_\_\_ Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with the construction of works as indicated in the application of which this statement is a part, according to the existing laws of the State of \_\_\_\_\_, and that the copy of the articles of association (or incorporation) of the company filed with said application is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company this \_\_\_\_\_ day of \_\_\_\_\_, in the year 19—.

[SEAL OF CORPORATION.] \_\_\_\_\_ of the \_\_\_\_\_ Company.

*Form 2. True List of Officers.*

[See regulation 9 (F).]

I, \_\_\_\_\_, do certify that I am the president of the \_\_\_\_\_ Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

In witness whereof I have hereunto set my name and the corporate seal of the company this \_\_\_\_\_ day of \_\_\_\_\_, in the year 19—.

\_\_\_\_\_  
President of the \_\_\_\_\_ Company.

[SEAL OF CORPORATION.]

*Form 3. Application for Preliminary Power Permit.*

[See regulation 10 (I).]

The \_\_\_\_\_, a corporation organized and existing under and by virtue of the laws of the State of \_\_\_\_\_ (\_\_\_\_\_ a citizen of the United States and resident of the State of \_\_\_\_\_), with office and principal place of business at \_\_\_\_\_, in the State of \_\_\_\_\_, hereby makes application for a preliminary power permit for the occupancy and use for a period of \_\_\_\_\_ months of certain lands of the United States in the State of \_\_\_\_\_, as such lands are approximately shown on a certain map executed by the undersigned applicant on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, which map is filed herewith and made a part hereof. The permit for which this application is made is desired in order that the applicant may secure the data required for an application for final permit for power purposes in accordance with the regulations governing applications under the act of February 15, 1901 (31 Stat., 790).

Map and papers required for this application are being submitted as follows:

1. As required by the regulations of the Department of the Interior.

(a) Complete application to the local land office at \_\_\_\_\_.

(b) Print copy of maps to the local land office at \_\_\_\_\_.

2. As required by the regulations of the Department of Agriculture: Complete application to the district forester at \_\_\_\_\_.

In witness whereof, \_\_\_\_\_ has caused this instrument to be executed this \_\_\_\_\_ day of \_\_\_\_\_, 19—.

[SEAL OF CORPORATION.]

By \_\_\_\_\_,  
\_\_\_\_\_  
\_\_\_\_\_

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*Form 4. Dating and Signature of Applicant.*

[See regulation 10 (J), (K), (L).]

This map (these estimates, this copy of notice, etc.) is a part of the application for preliminary power permit made by the undersigned this \_\_\_\_\_ day of \_\_\_\_\_, 19—.

By \_\_\_\_\_  
\_\_\_\_\_

*Form 5. Application for Final Power Permit for Project of More Than 100 Horsepower.*

[See regulation 11 (I).]

The \_\_\_\_\_, a corporation organized and existing under and by virtue of the laws of the State of \_\_\_\_\_ (\_\_\_\_\_ a citizen of the United States and resident of the State of \_\_\_\_\_), with office and principal place of business at \_\_\_\_\_, in the State of \_\_\_\_\_, hereby makes application for a final power permit for the occupancy and use of certain lands of the United States in the State of \_\_\_\_\_, by constructing, maintaining, and operating thereon for the main purpose of the development, transmission, and use of power (here add any other proposed purpose) the following works:

(Omit such of the four following items (a), (b), (c), (d) as may not be applicable.)

(a) \_\_\_\_\_ dams (masonry, earth, etc., diverting or storage) approximately \_\_\_\_\_ feet in maximum height and approximately \_\_\_\_\_ feet in maximum length, to occupy approximately \_\_\_\_\_ acres, respectively, and to form \_\_\_\_\_ reservoirs to flood approximately \_\_\_\_\_ acres of extreme flood level, \_\_\_\_\_ acres at the flow line fixed by the average effective head, and approximately \_\_\_\_\_ acres at spillway level, respectively;<sup>1</sup> in section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ meridian, said dams and said reservoirs being designated, respectively, as follows: \_\_\_\_\_.

(b) \_\_\_\_\_ conduits approximately \_\_\_\_\_ miles in length, respectively,<sup>1</sup> crossing sections \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ meridian, said conduits being designated, respectively, as follows: \_\_\_\_\_.

(c) \_\_\_\_\_ power houses and appurtenant structures to occupy approximately \_\_\_\_\_ acres, respectively,<sup>1</sup> in section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ meridian; said power houses being designated, respectively, as follows: \_\_\_\_\_.

(d) \_\_\_\_\_ transmission lines \_\_\_\_\_ miles in length, respectively,<sup>1</sup> crossing sections \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_,

<sup>1</sup> If land is unsurveyed substitute for the description by legal subdivisions in paragraphs (a), (b), (c), and (d), the following: "Located on certain lands described and shown by the map and field notes accompanying the application."

\_\_\_\_\_ meridian; said transmission lines being designated as follows: \_\_\_\_\_. All as approximately shown upon certain maps and plans which, together with certain papers, are filed herewith and made a part hereof; said maps, plans, and papers being designated as follows:<sup>2</sup>

- Exhibit A. Copy of articles of incorporation. (See Reg. 9 (A).)
- Exhibit B. Copy of State law under which the company was organized. (See Reg. 9 (B).)
- Exhibit C. Certificate of filing of articles. (See Reg. 9 (C).)
- Exhibit D. Certificate of compliance with laws. (See Reg. 9 (D).)
- Exhibit E. Official statement of organization. (See Reg. 9 (E) and Form 1.)
- Exhibit F. True list of officers. (See Reg. 9 (F) and Form 2.)
- Exhibit G. Copy of State law governing water rights. (See Reg. 9 (G).)
- Exhibit H. Certificate of no change in laws. (See Reg. 9 (H).)
- Exhibit I. Formal application. (See Reg. 11 (I) and Form 5.)
- Exhibit J. Maps of location and plans of structures as follows:  
(Here list separately as Exhibit J (1), Exhibit J (2), etc., with appropriate title, each map and plan submitted in compliance with Reg. 11 (J).)
- Exhibit K. Field notes of survey (See Reg. 11 (K)).
- Exhibit L. Estimates and data (See Reg. 11 (L)).
- Exhibit M. Evidence of water appropriation (See Reg. 11 (M)).
- Exhibit N. Statement of time desired (See Reg. 11 (N)).

80 This application has been prepared to be filed in accordance with the regulations of the Secretary of the Interior, in order that the undersigned applicant may obtain the benefits of the act of Congress approved February 15, 1901 (31 Stat., 790), entitled "An act relating to rights of way through certain parks, reservations, and other public lands."

Maps and papers required for this application are being submitted as follows:

1. As required by the regulations of the Department of the Interior.

(a) Complete application to the local land office at \_\_\_\_\_,

(b) Print copy of maps to the local land office as \_\_\_\_\_, \_\_\_\_\_.

2. As required by the regulations of the Department of Agriculture: Complete application to the district forester at \_\_\_\_\_, \_\_\_\_\_.

In witness whereof \_\_\_\_\_ has caused this instrument to be executed this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[SEAL OF CORPORATION.]

By \_\_\_\_\_,  
\_\_\_\_\_.

<sup>2</sup> The entire series of exhibits shown above should be listed in the application with the foregoing designations, but such of the exhibits as are not applicable or are not required by the regulations may be omitted and the indorsement "Not applicable" or "Not required" be made at the proper place in the list.

*Form 6. Affidavit of Applicant's Engineer and Certificate of Applicant on Maps and Plans.*

[See Regulation 11 (J).]

STATE OF ———, County of ———, ss:

—————, being duly sworn, says he is by occupation a ——— engineer, employed by the ——— company, and that this map (plan) (a) was prepared under his supervision from actual surveys and designs; (b) is in complete agreement with the surveys from which the accompanying field notes, marked "Exhibit K," were made; (c) correctly represents so far as shown hereon, the location and design of the works described in the accompanying application form, marked "Exhibit I;" (d) to the best of his knowledge and belief correctly represents all other matters shown hereon; and (e) represents a safe, adequate, and feasible plan for the fullest economic utilization of the power resources involved.

—————, Engineer.

Subscribed and sworn to before me this ——— day of ———, 19—.

[SEAL.]

—————, Notary Public.

This is to certify that ———, who subscribed the affidavit hereon is the person employed by the undersigned applicant to prepare this map (plan), which map (plan) has been adopted by the applicant as the approximate final location (design) of the works thereby shown; and that this map (plan) is filed as Exhibit J—of the complete application whose several parts are described in the accompanying application form marked "Exhibit I."

[SEAL OF CORPORATION.]

By ———,  
—————.

*Form 7. Affidavit of Applicant's Engineer and Certificate of Applicant on Field Notes of Surveys.*

[See regulation 11 (K).]

STATE OF ———, County of ———, ss:

—————, being duly sworn, says he is by occupation a ——— engineer employed by the ——— company; that the foregoing notes of survey are a true and complete copy of the field notes of an actual location survey made under his direction as an employee of said company; that all of said notes and no others were used to locate on the maps filed together herewith and marked "Exhibit J" the works described on the application form filed herewith and marked "Exhibit I."

—————, Engineer.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_,  
 19\_\_\_\_.  
 [SEAL.] \_\_\_\_\_, *Notary Public.*

81 This is to certify that \_\_\_\_\_, who subscribed the affidavit hereon, is the person employed by the undersigned applicant to make the survey represented by these field notes, which survey was authorized by the applicant; and that these field notes are filed as Exhibit K of the complete application which several parts are described in the accompanying application form marked "Exhibit I."

[SEAL OF CORPORATION.]

By \_\_\_\_\_,  
 \_\_\_\_\_.

*Form 8. Affidavit of Applicant's Engineer and Certificate of Applicant on Estimates and Data.*

[See Regulation 11 (L).]

STATE OF \_\_\_\_\_, *County of* \_\_\_\_\_, *ss:*

\_\_\_\_\_, being duly sworn, says he is by occupation a \_\_\_\_\_ engineer employed by the \_\_\_\_\_ company; that the accompanying estimates and data were prepared under his supervision; that the data are all the data available for the estimates; and that both data and estimates are correct to the best of his knowledge, judgment, and belief and provide a safe and satisfactory basis for the power project described in the accompanying application form marked "Exhibit I."

\_\_\_\_\_, *Engineer.*

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_,  
 19\_\_\_\_.  
 [SEAL.] \_\_\_\_\_, *Notary Public.*

This is to certify that \_\_\_\_\_, who subscribed the affidavit hereon, is the person employed by the undersigned applicant to prepare the accompanying estimates and data; that the estimates and data have been approved by the applicant and are filed as Exhibit L of the complete application, whose several parts are described in the accompanying application form marked "Exhibit I."

[SEAL OF CORPORATION.]

By \_\_\_\_\_,  
 \_\_\_\_\_.



U. S. Department of Agriculture,  
Forest Service.

Henry S. Graves, Forester.

The National Forest Manual.

*Regulations of the Secretary of Agriculture and Instructions to Forest Officers Relating to Water Power (Act of February 15, 1901) and Telephone, Telegraph, and Power Transmission Lines (Act of March 4, 1911).*

Issued by the Secretary of Agriculture, to take effect February 24, 1913.

Water Power, Telephone, Telegraph, Power Transmission Lines.

[Seal United States Department of Agriculture.]

Washington: Government Printing Office, 1913.

U. S. Department of Agriculture,  
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Issued by the Secretary of Agriculture, to take effect February 24, 1913.

Water Power, Telephone, Telegraph, Power Transmission Lines.

[Seal United States Department of Agriculture.]

Washington: Government Printing Office, 1913.

84      The Secretary \* \* \* may make such rules and regulations \* \* \* as will insure the objects of said reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of this act or such rules and regulations shall be punished (by \$500 fine or 12 months' imprisonment, or both) as is provided for in the act of June 4, 1888, amending section 5388 of the Revised Statutes of the United States. (Act of June 4, 1897, 30 Stat., 11.)

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UNITED STATES DEPARTMENT OF AGRICULTURE,  
OFFICE OF THE SECRETARY,  
WASHINGTON, D. C.

By virtue of the authority vested in me by the act of Congress of February 1, 1905 (33 Stat., 628), amendatory of the act of Congress of June 4, 1897 (30 Stat., 11), and by the act of Congress of March 4, 1911 (36 Stat., 1253), I, James Wilson, Secretary of Agriculture, do make and publish the following regulations for the occupancy and use of the National Forests for purposes of power development and

utilization, and for telephone, telegraph and power-transmission lines, the same to supersede all previous regulations for like purposes, and to be of force and effect from the date of this order, and to constitute a part of the Use Book.

In testimony whereof I have hereunto set my hand and official seal at Washington, D. C., this 24th day of February, 1913.

[SEAL.]

JAMES WILSON,  
*Secretary of Agriculture.*

Water Power, Act of February 15, 1901.

Reg. L-1. Preliminary power permits will allow the occupancy of the lands of the United States within National Forests, hereinafter called "National Forest lands," for the purpose of securing the data required for an application for final permit and for such construction as may be necessary to preserve water appropriation during that period. Final power permits will allow the occupancy and use of such lands for the construction, maintenance, and operation thereon of project works for the development, transmission, and use of power. Preliminary or final permits for power sites of a total capacity in excess of one hundred (100) horsepower will be granted, extended, and renewed only by the Secretary of Agriculture, hereinafter called "the Secretary." Permits for transmission lines (except such as are included in a general power permit) will be granted, extended, and renewed by the Forester. Permits for power sites of a total capacity of one hundred (100) horsepower or less will be granted, extended, and renewed by the district forester. The Secretary alone may revoke power permits.

Reg. L-2. Application for preliminary or final permits for occupancy or use of lands of the United States should be submitted as follows:

For National Forest lands: To the district forester of the district in which the lands are situated.

90 For lands of the United States which are outside the National Forests: To the local land office of the land district in which the lands are situated (unless otherwise directed by the regulations of the Department of the Interior).

For lands in part National Forest lands and in part lands of the United States outside the National Forests: In the same manner as for National Forest lands, but the applicant shall also submit to the local land office in the land district in which the lands outside the National Forests are situated such maps and papers and copies thereof as are required in the regulations of the Department of the Interior.

Reg. L-3. Priority of consideration of applications for final power permits shall be initiated in the order of filing complete applications, whether such applications be for preliminary permits as prescribed in Regulation L-10 or for final permits as prescribed in either Regulation L-11 or Regulation L-12. If a preliminary permittee shall file such complete application for final permit before loss of priority initiated by the application for preliminary permit, the



priority so initiated shall be maintained by the application for final permit and be effective as of the date of the application for the preliminary permit. Priority shall be maintained, however, only in so far as the projects shown in the application for final permit are within the approximate limits of diversion and discharge as shown in the application for the preliminary permit. Priority initiated or maintained by an application for final permit shall be lost if the applicant fails to make the payment required and to return a duly executed stipulation as prescribed in Regulation L-14 or in Regulation L-15 within 90 days from a date fixed in the letter transmitting such stipulation to him, unless a longer time is allowed by written authority of the Secretary. Priority initiated by an application for preliminary permit shall be lost (1) if the initial payment is not made within 60 days of demand therefor, or (2) if the application for final permit is not filed within the time required in the preliminary permit. Priority initiated or maintained by an application for a permit shall be lost if the permit is revoked. No other application, either preliminary or final, for a like use covering in whole or in part the same or adjacent lands will be accepted from the permittee whose priority is lost until the expiration of one year thereafter; and this restriction shall extend to transferees of the permittee, and if the permittee is a corporation, to reincorporations representing the same or associated interests, whenever in the judgment of the Secretary a transfer or reincorporation has been effected for the purpose or with the result of escaping the restriction of this regulation, it being the intent of such restriction to leave open to other applicants for a period of one year power sites upon which priorities have lapsed as provided in this regulation.

Reg. L-4. Final permits will be issued only in case it appears that the proposed occupancy and use will be in general accord with the most beneficial utilization of the resources involved and consistent with the public interest. No final power permit will be issued if the works to be constructed thereunder will in any way interfere with works operated or constructed or to be constructed under an existing final power permit. No final power permit will be  
91 issued for the construction of works within an area covered by a prior preliminary permit until after the filing of final application or the loss of priority by the prior preliminary permittee. Applications for final power permits involving in whole or in part the same lands will be examined in order of their priority, but before the issuance of final permit consideration may be given, in the discretion of the Secretary, to the financial ability and business connections and affiliations of the applicants. Successive preliminary permits may be issued covering the same power site, but in each successive preliminary permit it shall be specified that such permit is subordinate to all outstanding prior permits and shall not adversely affect any rights thereunder.

Reg. L-5. The applicant must file the evidence of initiation of water appropriation as in these regulations hereafter required. Thereafter no protest against the issuance of a permit, if based solely upon alleged lack of water rights, will be considered; nor, in

general, will any allegation that the time of beginning or completion of construction has been or is delayed by litigation over water rights be accepted as a sufficient reason for granting any extension of time. Wherever the approval of a local administrative board or commission is a condition precedent to the right either to take and use water for power purposes or to engage in the business of the generation, transmission, or distribution of power, certified evidence of such approval must be filed with the district forester before a final permit will be issued.

Reg. L-6. Unless sooner revoked by the Secretary, a final power permit shall terminate at the expiration of 50 years from the date of the permit. If, however, at any time not less than 2 or more than 12 years prior to the termination of the permit the permittee shall formally notify the Secretary that he desires a new permit to occupy and use such lands as are occupied and used under the existing permit, and will comply with all then existing laws and regulations governing the occupancy and use of National Forest lands for power purposes, the existing permit will be considered as an application for such new permit.

Reg. L-7. The following terms, wherever used in these regulations, shall have the meaning hereby in this regulation assigned to them, respectively, viz:

"Municipal purposes" means and includes all purposes within municipal powers as defined by the charter of the municipal corporation, where any such purpose is directly pursued by the municipal corporation itself with the primary object of promoting the security, health, good government, or general convenience of its inhabitants.

"Power business" means the entire business of the applicant or permittee in the generation, distribution, and delivery of power by means of any one power system, together with all works and tangible property involved therein, including freeholds and leaseholds in real property.

"Power system" means all interconnected plants and works for the generation, distribution, and delivery of power.

"Power project" means a complete unit of power development, consisting of a power house, conduit or conduits conducting water thereto, all storage or diverting or fore-bay reservoirs used in connection therewith, the transmission line delivering power  
92 therefrom, any other miscellaneous structures used in connection with said unit or any part thereof, and all lands the occupancy and use of which are necessary or appropriate in the development of power in said unit.

"Project works" means the physical structures of a power project.

"Construction of the project works" means the actual construction of dams, water conduits, power houses, transmission lines, or some permanent structure necessary to the operation of the complete power project, and does not include surveys or the building of roads and trails, or the clearing of reservoir sites or other lands to be occupied, or the performance of any work preliminary to the actual construction of the permanent project works.

"Operation period" means the period covered by final permit subsequent to the actual beginning of operation.

"Survey-construction period" means the period covered by preliminary and final permits prior to the operation period.

"Nominal stream flow" means the sum of (a) the flow determined by averaging the values estimated for the natural mean flow for the two-month (calendar) minimum-flow period in each successive five-year period or major fraction thereof, and (b) the stream flow made available from storage not by the project works.

"Load factor" means the ratio of average power output to maximum power output.

"Total capacity of the power site" means the continued product of (1) the factor 0.08;<sup>1</sup> (2) the average effective head, in feet; (3) the stream flow estimated to be available at the intake (in second-feet and in amount not to exceed the maximum hydraulic capacity of the project works considered as the sum of (a) the nominal stream flow and (b) stream flow made available from storage by project works; and (4) a factor not less than the average load factor of the power system, representing the degree of practicable utilization of the stream flow estimated to be available, and based on the extent of fore-bay storage and the load factor of the power system.

"Rental capacity of the power site" means the capacity on which the rental charges are based. Unless otherwise ordered by the Secretary, it will be determined by making the following deductions from the total capacity of the power site.

(a) Whenever power projects include water-conduit sites not wholly on National Forest lands a deduction will be made from that part of the total capacity of the power site which is due to the use of the nominal stream flow. This deduction will be, in per cent, the sum of (1) the product of the proportion of the average effective head obtained from the dam by the per cent of submerged lands below the flow line fixed by the average effective head that are not National Forest lands, and (2) the product of the proportion of the average effective head obtained from the water conduit (from intake to tail-race outlet) by the per cent of the length of said conduit which is not located on National Forest lands.

(b) Whenever power projects include reservoir sites not wholly on National Forest lands a deduction will be made from that part of the total capacity of the power site which is due to the use of stream flow made available from storage by the project works. This deduction will be the per cent of the total area of the reservoir sites that is not National Forest land.

(c) From the total capacity of the power site which remains after deductions (a) and (b) have been made will be made a further deduction which, in per cent, shall be the product of the square of the distance of primary transmission in miles and the factor of 0.001, but in no case shall deduction (c) exceed 25 per cent.

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<sup>1</sup> The factor 0.08 represents the horsepower at 70 per cent efficiency of a second-foot of water falling through a head of 1 foot.

Reg. L-8. The occupancy and use of National Forest lands (otherwise than by transmission lines) under a preliminary or final power permit for power sites of more than 100-horsepower total capacity (except permits to municipal corporations for municipal purposes, or for irrigation, or for temporary construction of project works as in this regulation hereafter specified) will be conditioned on the payment in advance for each calendar year of a rental charge calculated from the "rental capacity of the power site," as defined in Regulation L-7, at the following rates per horsepower per year, unless otherwise ordered by the Secretary:

For the unexpired portion of the calendar year and for the first full calendar year of the survey-construction period, and similarly for the operation period.....	\$0.10
For the second full calendar year of each of said periods....	.20
For the third year.....	.30
For the fourth year.....	.40
For the fifth year.....	.50
For the sixth year.....	.60
For the seventh year.....	.70
For the eighth year.....	.80
For the ninth year.....	.90
For the tenth and each succeeding year.....	1.00

The occupancy and use of National Forest lands by transmission lines, except only where such lines are owned and operated by a municipal corporation for municipal purposes, or are part of a power project under permit, or are to be used temporarily in the construction of project works under permit issued to the same permittee, will be conditioned on the payment in advance for each calendar year of a rental charge of five dollars (\$5) for each mile or fraction thereof, unless otherwise ordered by the Secretary.

The rental charges on account of a preliminary power permit will be calculated from the rental capacity of the power site as estimated by the Secretary at the time of granting such permit. The rental charges on account of a final power permit will be calculated from the rental capacity of the power site as estimated by the Secretary at the time of granting said final permit, provided that said estimated rental capacity may be adjusted by the Secretary (a) to provide for changes made during construction, (b) annually to provide for changes in ownership of lands in reservoir sites and on water-conduit lines, and for changes in length of primary transmission, (c) to provide for changes in nominal stream flow whenever such flow is increased or decreased because of additional storage or otherwise; or (d) whenever not less than ten (10) years after the determination of the last preceding estimated value thereof, the permittee shall apply for or the Secretary give notice of a redetermination of the rental capacity of the power site.

The first payment by every permittee shall be the charge for a full year, but any excess of said payment over the pro rata charge for the unexpired portion of the calendar year in which the permit is issued will be credited to the permittee as a part of his payment for the first full calendar year.

All payments made for the survey-construction period will be credited to the permittee for the cancellation of charges as they become due in the operation period.

No rental charge will be made for the occupancy and use of National Forest lands under a preliminary or final power permit (except as hereinbefore provided for transmission lines) authorizing such occupancy and use by municipal corporations for municipal purposes, or by other permittees for irrigation as auxiliary to irrigation works owned and operated by the permittees, or for the temporary development of power to be used in the construction of permanent project works under permit issued to the same permittees. Whenever a power project is not used exclusively for the purposes above named, such a proportional part of the full schedule charge for any calendar year will be credited to the permittee as the power developed by the project works and used for the purposes above named bears to the total output of the project works for said year. All amounts so credited will be applied to the cancellation of charges as they may thereafter become due.

If all or any part of the amounts due for rental charges as required in the preliminary permit shall, after due notice has been given, be in arrears for 60 days, then and thereupon the preliminary permit shall terminate and be void without revocation by the Secretary. If all or any part of the amounts due for rental charges, as required in the final permit, shall, after due notice has been given, be in arrears for six months, then and thereupon the final permit shall terminate and be void and will be formally revoked by the Secretary.

At any time not less than 10 years after the issuance of final permit or after the last revision of rates of rental charges thereunder, the Secretary may review such rental rates and impose such new rental rates as he may decide to be reasonable and proper: Provided, That such rental rates shall not be so increased as to reduce the margin of income (including appreciation in land values) from the power project under permit, over proper actual and estimated expenses (including reasonable allowance for renewals and sinking-fund charges) to an amount which, in view of all the circumstances (including fair development expenses and working capital) and risks of the enterprise (including obsolescence, inadequacy, and supersession) is unreasonably small, but the burden of proving such unreasonableness shall rest upon the permittee.

The decision of the Secretary shall be final as to all matters of fact upon which the calculation of the capacities or rentals depends.

Reg. L-9. All applications for power permits, whether preliminary or final, to occupy and use National Forest lands under these regulations shall be filed with the district forester of the district in which the lands are situated and shall, if the applicant be an individual, contain a sworn statement that he is a citizen of the United States. If the applicant is an association of citizens, the application shall contain a sworn statement that each member is a citizen of the United States. Associations must, in addition, submit their



articles of association; if there be none, the fact must be stated over the signature of each member of the association.

95 If the applicant is an incorporated company its application must be accompanied by the papers below in this regulation specified:

(A) A copy of its articles of incorporation, duly certified to by the officer of the State having custody of the original thereof.

(B) When a company is operating in a State other than that in which it is incorporated, it must submit the certificate of the proper officer of the State that it has complied with the laws of that State governing foreign corporations to the extent required to entitle the company to operate in such State.

(C) A true list, signed by the secretary, under the seal of the company, showing the names and designations of its officers and directors at the date of the filing of the items by this regulation required.

Reg. L-10. All applications for preliminary permits to occupy and use National Forest lands for the purpose of securing the data required for an application for final permit for power projects of more than 100 horsepower total capacity shall consist of the following items (in addition to those specified in Regulation L-9), each of which shall be dated and signed by the applicant:

(D) An application in triplicate, on Form 58.

(E) A map on tracing linen, and three print copies, cut to a uniform size and not larger than 28 by 40 inches and not smaller than 24 by 36 inches, with scale so selected as to show upon a single map the power project or projects applied for, showing the approximate location of the dams, reservoirs, conduits, power houses, and other project works. The map shall show: For each reservoir site, the distance and bearing of one extremity of the dam from the nearest existing corner of the public survey and approximately the position of the maximum flow line; and for each water-conduit line, the distance and bearing of each terminus from the nearest existing corner of the public survey and the approximate location of the water conduit. If on unsurveyed land, the distances and bearings may be taken from a permanent mark on some natural object or permanent monument that can be readily found and recognized.

(F) Estimates in triplicate for each power project of (1) the total average effective head to be utilized, and the per cent thereof to be obtained from dam and water conduit, respectively; (2) the stream flow, and the per cent thereof to be made available from storage by the project works and by other works, respectively; (3) the area to be flooded by back water from the diversion dam; (4) the length of the proposed water conduit (from intake to tail-race outlet); (5) the area and available capacity of each proposed storage reservoir; (6) the probable load factor of the power system; and (7) the distance, in miles, of proposed primary transmission.

These estimates should be accompanied by complete statements in detail of all data on which they are based, including stream measurements, rainfall, stream flow and evaporation records, drainage



areas, probable points of delivery of power, and any other pertinent information.

(G) A duly certified copy of such notice or application, if any, as is required to be posted or filed, or both, to initiate the appropriation of water under the local laws. This notice or application should provide for use, by the applicant for a power permit or by his predecessors, of sufficient water for the full operation of the project works.

Application must be made for the occupancy and use of such lands for a definite, limited period only, which period will allow a reasonable time for the preparation and filing of the final application as prescribed in Regulation L-11. The time prescribed in the preliminary permit may upon application be extended by the Secretary if the completion of the final application has been prevented by unusual climatic conditions that could not reasonably have been foreseen or by some special or peculiar cause beyond the control of the permittee.

An application for a preliminary power permit shall not be complete until every map or paper required by Regulation L-9 and by this regulation shall have been filed in the form prescribed.

Reg. L-11. All applications for final permits to occupy and use National Forest lands for power projects of more than 100 horsepower total capacity shall consist of the following items (in addition to those specified in Regulation L-9):

(D) An application in triplicate on Form 60.

(E) Maps of location and plans of structures on tracing linen, with three print copies cut to uniform size not larger than 28 by 40 inches and not smaller than 24 by 36 inches, with graphical scale not less than 6 inches in length drawn thereon. Separate sheets shall be used for maps of location whenever the whole survey can not be shown upon a single sheet.

(1) The following maps and plans shall be submitted for each reservoir that will be a part of the power project or projects applied for: (a) A contour map of each reservoir site, dam, and dam site on a scale of not more than 400 feet to the inch, with a contour interval of not more than 10 feet. The contour map for each reservoir site shall show the high-water flow line and in case the reservoir is to be used in whole or in part for diversion purposes, the flow line fixed by the estimated average effective head, and also a table of areas and capacities for each flow line and each contour line. (b) A cross section of each dam site along the center line of the proposed dam, with a graphical log properly located thereon of each boring, test pit, or other exploration, and a brief statement of the character and dip of underlying material. (c) Plans, elevations, and cross sections of the dams, showing spillways, sluiceways, or sluice pipes, and other outlet works; and also a statement of the volume of the dam, the character of the materials used, and the type of construction.

(2) The following maps and plans shall be submitted for the entire length of each water conduit, from intake to tailrace outlet, that will be a part of the power project or projects applied for:

(a) A contour map and profile of the entire water-conduit location on a scale of not more than 400 feet to the inch, with contour interval of not more than 10 feet. The contours shall cover either an area of 100 feet in width on each side of the center line of the water conduit or a difference in elevation of at least 25 feet above and below the grade line of the conduit. This map shall show the transit line of the survey and the center line of the proposed final location of the water conduit, including curves between tangents. This map shall also show what sections of the water conduit will be in flume, ditch, tunnel, pipe, etc., and the grade of each section. (b)

97 Plans, elevations, and cross sections of each type of water conduit, showing material, dimensions, grades, flow line, and capacity and plans and elevations of intake works and fore bays.

(3) A contour map on a scale of not more than 50 feet to the inch, with a contour interval of not more than 5 feet, showing the proposed location of the power house, other buildings, etc., shall be filed for each power-house site that will be a part of the power project or projects applied for. This map shall also state the proposed type and estimated number and rated capacity of the water wheels and generators to be used.

(4) A map of the survey of the proposed final location of the center line of the transmission line, on a scale of not more than 1,000 feet to the inch, shall be filed for such portions of transmission lines as are located upon National Forest lands.

(5) A general map of the entire power project or projects applied for (except transmission lines), on such a scale that the entire survey may be shown upon a single sheet; also a similar map showing the entire primary transmission system.

(F) Copies of field notes in triplicate of the entire final location survey of water conduits, and transmission lines, the exterior boundaries of power-house and reservoir sites, and all reference lines to public-land corners.

(G) Estimates in triplicate for each power project of (1) the total average effective head to be utilized, and the per cent thereof to be obtained from dam and from water conduit, respectively; (2) the stream flow, and the per cent thereof made available from storage by the project works and by other works, respectively; (3) the area to be flooded by the dam below the flow line fixed by the estimated average effective head; (4) the length of the proposed water conduit (from intake to tailrace outlet); (5) the area and available capacity of each proposed storage reservoir; (6) the available storage capacity of fore bays (or diversion pond); (7) the probable load factor of the power system, and (8) the distances in miles of primary transmission.

These estimates should be accompanied by complete statements in detail of all data on which they are based, including stream measurements, rainfall, stream flow, and evaporation records, drainage areas, total static head and losses in head, probable maximum, minimum, and average power output, load curves of the power, system, efficiencies of machinery, probable points of delivery of power, and all other pertinent information.

(H) Such evidence of water appropriation as is specified in Regulation L-10 (G). If such evidence has been filed with an application for a preliminary permit, only such additional evidence, in general, will be required as will cover appropriations or transfers subsequent to the date of the evidence filed with the application for preliminary permit. But wherever the approval of a local administrative board or commission is a condition precedent to the right either to take and use water for power purposes or to engage in the business of the generation, transmission, or distribution of power, certified evidence of such approval must also be filed with the application for final permit.

(I) A detailed statement in triplicate by the applicant of the time desired for making financial arrangements, for completing preliminary construction, and for beginning "construction of the project works," as defined in Regulation L-7.

(J) The application shall be accompanied by an affidavit of the applicant's engineer and a certificate of the applicant (see pp. 31 and 32). Affidavits and certificates will not be placed upon maps, plans, and other exhibits, but will be filed as separate exhibit.

The maps and field notes shall show reference lines to initial point of survey, to termini of water conduits, and to termini of transmission lines (when within a National Forest, or not more than 2 miles outside its exterior boundary measured along the transmission line). The maps and field notes shall also show the intersection of the survey line with the lines of public-land subdivision and with boundaries of National Forests and other reservations of the United States.

The termini of water conduits, the termini of transmission lines, the intersections with boundaries of reservations of the United States, and the initial point of survey of power-house sites shall be fixed by reference by course and distance to the nearest existing corner of the public survey. The initial point of the survey of reservoir sites shall be fixed by reference by course and distance to the nearest existing corner outside of the reservoir by a line or lines not crossing an area that will be covered with water when the reservoir is in use. When any such terminus, intersection, or initial point is upon unsurveyed land, it shall be connected by traverse with an established corner of the public survey, and the distance from the terminus, intersection, or initial point to the corner shall be computed and noted on the map. When the nearest established corner of the public survey is more than 2 miles distant, this connection may be with a permanent mark on a natural object or a permanent monument which can be readily found and recognized. The field notes shall give an accurate description of the natural object or monument and full data of traverse as required above. The intersections of the survey lines with section lines of the public-land survey shall be referenced by course and distance to the nearest existing corner along the section lines intersected. If no corner can be found within a half mile of the survey line, the fact may be noted on the map and in the field notes,

and the reference omitted. The maps shall also show all lines of public-land subdivisions by official survey; the protractions on unsurveyed land of section and township lines, such protractions in any National Forest to conform to the diagram accompanying the proclamation establishing the boundaires of such National Forest; and the status as to ownership of all lands of the power project or projects, designating separately lands patented, lands of the United States entered or otherwise embraced in an unperfected claim under the public-land laws, unreserved lands of the United States, and, separately for each reservation, lands included within National Forests and other reservations of the United States. Elevations and contour lines shall be based on United States Geological Survey datum whenever available.

Each separate original map, plan, set of field notes, estimates and data, evidence of water appropriation, articles of incorporation, etc., shall be plainly marked "Exhibit A," "Exhibit B," etc., respectively, and referred to by such designation in the application. Maps and plans shall in addition be described in the application

by their titles as "Exhibit A, map of location of," etc.,  
 99 "Exhibit B, plan of," etc. Duplicate and triplicate copies, etc., should be marked "Exhibit A, duplicate," "Exhibit A, triplicate," etc. Maps should be rolled for mailing, and should not be folded.

An application for final permit shall not be complete until every map or paper required by Regulation L-9 and by this regulation has been filed in the form prescribed.

Reg. L-12. No applications will be received for preliminary permits for the occupancy and use of National Forest lands for power projects of 100 horsepower total capacity or less. Applications for final permits for such occupancy and use shall be in writing, dated, and signed by the applicant, and, in addition to the items specified in Regulation L-9, shall be accompanied by:

(D) Maps showing the location of dams, reservoirs, conduits, power houses, and transmission lines or other works.

(E) Field notes of the survey in triplicate.

(F) A statement in triplicate of the amount of water to be diverted for use, the maximum capacity of the diversion works, and the total average static and effective heads to be utilized.

(G) Such showing as is specified in Regulation L-11 (H).

The map shall consist of one original on tracing linen and three print copies, and shall not be larger than 28 by 40 inches or smaller than 24 by 36 inches, and may be on any convenient scale. The map shall show the status as to ownership of all lands in the power project, designating separately lands patented, lands of the United States entered or otherwise embraced in any unperfected claim under the public-land laws, unreserved lands of the United States, and, separately for each reservation, lands included in National Forests and other reservations of the United States. The map shall also show: For each reservoir site, the distance and bearing of the initial point of survey from the nearest existing corner of the public survey, the location of the maximum-flow line, and the area and avail-

able storage capacity of the reservoir; for each water-conduit line, the distance and bearing of each terminus from the nearest corner, of the public survey, the location of the center line of the conduit, its length, and the intersections of the center line with the section lines of the public-land survey and boundaries of National Forests and other reservations of the United States; and for each powerhouse site, the distance and bearing of the initial point of survey from the nearest corner of the public survey, the location of the exterior boundaries of the site, and the area. If on unsurveyed land, the distances and bearings may, if the nearest existing corner of the public survey is more than 2 miles distant, be taken from a permanent mark on some natural object or permanent monument that can be readily found and recognized.

Reg. L-13. Before a final power permit will be issued the permittee shall execute and file a stipulation, which, upon its approval, shall constitute and express the conditions of the permit. Such stipulation shall expressly bind the applicant to such of the items enumerated in Regulations L-14 and other such conditions as may be required.

Reg. L-14. In so far as applicable to the specific occupancy and use under permit, the occupancy and use of National Forest lands for power purposes will be permitted upon the following  
100 conditions, and not otherwise; and these conditions shall also apply to all existing permits, in which the occupancy and use of National Forest land is conditioned upon the compliance by the permittee with the regulations of the Secretary as at any time existing. In general such conditions will be embodied in a stipulation to be signed by the applicant, but whether embodied or not, and in so far as applicable, the permittee will be bound:

(A) To construct the project works on the location shown upon and in accordance with the maps and plans submitted with the final application for permit, and to make no material deviation from said location unless and until maps and plans showing such deviation shall have been submitted and approved. (See Reg. L-16.)

(B) To begin the construction of the project works, or the several parts thereof, within a specified period or periods from the date of execution of the permit, and thereafter to diligently and continuously prosecute such construction unless temporarily interrupted by climatic conditions or by some special or peculiar cause beyond the control of the permittee.

(C) To complete the construction and begin the operation of the project works, or the several parts thereof, within a specified period or periods from the date of execution of the permit.

(D) To operate the project works continuously for the development, transmission, and use of power, unless upon a full and satisfactory showing that such operation is prevented by unavoidable accidents or contingencies this requirement is temporarily waived by the written consent of the Secretary.

(E) To pay annually, in advance, such rental charges as may be fixed and required by the Secretary under these regulations. (Reg. L-8.)



(F) On demand of the Secretary to install at such places and maintain in good operating condition in such manner as shall be approved by the Secretary, free of all expense to the United States, accurate meters, measuring weirs, gauges, or other devices approved by the Secretary and adequate for the determination of the amount of power developed by the project works and of the flow of the stream or streams from which the water is to be diverted for the operation of the project works and of the amount of water used in the operation of the project works and of the amount of water held in and drawn from storage; to keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Secretary; and to make a return during January of each year, under oath, of such of the records of measurements for the year ended on December 31, preceding, made by or in the possession of the permittee, as may be required by the Secretary.

(G) That the books and records of the permittee, in so far as they contain information concerning the power project or projects under permit and the power business conducted in connection therewith, shall be open at all times to the inspection and examination of the Secretary, or other officer or agent of the United States duly authorized to make such inspection and examination.

(H) On demand of the Secretary to maintain a system of accounting of the entire power business conducted in connection with the power project or projects under permit in such form as the Secretary may prescribe or approve, which system as far as is practicable

will be uniform for all permittees, and to render annually  
101 such reports of the power business as the Secretary may direct: Provided, however, That if the laws of the State in which the power business or any part thereof is transacted require periodical reports from public-utility corporations under a uniform system of accounting, copies of such reports so made will be accepted as fulfilling the requirements of this clause.

(I) To protect all Government and other telephone, telegraph, and power-transmission lines at crossings of and at all places of proximity to the permittee's transmission line in a workmanlike manner according to the usual standards of safety for construction, operation, and maintenance in such cases, and to maintain transmission lines in such manner as not to menace life or property.

(J) To clear and keep clear all lands of the power project for such width and in such manner as the Forest officers may direct.

(K) To dispose of all brush, refuse, or unused timber on National Forest lands resulting from the construction and maintenance of the project works, as may be requested by the Forest officers.

(L) To build and repair roads and trails as required by the Forest officers, or other agents of the United States, whenever any existing roads or trails are destroyed or injured by the construction work or flooding under permit; and to build and maintain necessary and suitable crossings for all roads and trails which intersect the water conduit, if any, constructed, maintained, or operated under permit.

(M) To do everything reasonably within the power of the per-



mittee, its employees, contractors, and employees of contractors, both independently and on request of the Forest officers, or other agents of the United States, to prevent and suppress fires upon or near the lands occupied under permit.

(N) To pay the full value, as fixed by the district forester, of all timber cut, injured, or destroyed on National Forest lands in the construction, maintenance, and operation of the project works.

(O) To pay the United States full value resulting from the breaking of or the overflowing, leaking, or seeping of water from the project works, and for all other damage to the lands or other property of the United States caused by the neglect of the permittee or of the employees, contractors, or employees of the contractors of the permittee.

(P) To indemnify the United States against any liability for damage to life or property arising from the occupancy or use of National Forest lands by the permittee.

(Q) To sell power to the United States, when requested, at as low a rate as is given to any other purchaser for a like use at the same time and under similar conditions if the permittee can furnish the same to the United States without diminishing the quantity of power sold before such request to any other customer by a binding contract of sale: Provided, That nothing in this clause shall be construed to require the permittee to increase permanent works or to install additional generating machinery.

(R) To abide by such reasonable regulation of the service rendered and to be rendered by the permittee to consumers of power furnished or transmitted by the permittee, and of rates of payment therefor, as may from time to time be prescribed by the State or any duly constituted agency of the State in which the service is rendered.

(S) Upon demand therefor in writing from the Secretary to surrender the permit to the United States or to transfer the same to such State or municipal corporation as the Secretary may designate, and on the conditions specified in this paragraph; also to give, grant, bargain, sell, and transfer with the permit (upon such demand and upon said conditions) all works, equipment, structures, and property then owned or held and then valuable or serviceable in the generation, transmission, or distribution of electrical or other power, and which are then dependent in whole or in part for their usefulness upon the continuance of the permit, together with all interest in any leaseholds of operating property used in connection with the works under permit, and all contracts for the sale and delivery of electrical or other power. The Secretary may require such surrender if the United States shall desire to take over the permit and properties, or whenever a substantial part of such property is situated elsewhere than on National Forest lands he may designate as such transferee any State or municipal corporation which shall desire such transfer: Provided, however, That no municipal corporation shall be so designated unless by condemnation it shall have acquired, or unless by proceedings in a court of competent jurisdiction it shall have been determined that such municipality has the right to acquire, such property situated

elsewhere than on National Forest lands: And provided further, That no such municipal corporation shall be so designated unless it also has the power to acquire the said property and rights of the permittee in accordance with the following conditions. Such surrender or transfer shall be on condition precedent that the United State or such transferee shall first pay to the permittee the reasonable value of all said works, equipment, structures, and other tangible property, and in addition thereto a bonus of three-fourths of 1 per cent of such reasonable value for each full year of the unexpired term of the permit. Such reasonable value shall not include any sum for any permit, franchise, or right granted by the United States, by any State, or by any municipal corporation in excess of the amount (exclusive of any tax or annual charge) actually paid to the United States or to such State or municipal corporation as the compensation for the granting of such permit, franchise, or right, or any sum for any other intangible properties or values whatsoever, it being the intent of this paragraph that all such intangible values shall be covered by the bonus herein provided for. Such reasonable value shall be determined by mutual agreement between the parties in interest; and, in case they can not agree, by a board of arbitration of three members, one of whom shall be named by the permittee and one by the transferee; the third shall be either the Secretary or some representative whom he may name. The reasonable value, for the purposes of such determination, of such works, equipment, structures, and other tangible property shall be the cost of production of such works, equipment, structures, and other tangible property under substantially the same conditions as existed at the time of the original construction and at prices for labor and material which shall be the average of such prices for the five years next preceding the date of valuation, less a percentage of such reproduction cost equal to the per cent of physical and functional depreciation of the existing works, equipment, structures, and other tangible property.

(T) That in respect to the regulation by any competent public authority of the service to be rendered by the permittee or  
103 the price to be charged therefor, and in respect to any purchase or taking over of the properties or business of the permittee or any part thereof by the United States, or by any State within which the works are situated or business carried on in whole or in part, or by any municipal corporation in such State, no value whatsoever shall at any time be assigned to or claimed for the permit applied for, or for the occupancy or use of National Forest lands granted thereunder, nor shall such permit or such occupancy and use ever be estimated or considered as property upon which the permittee shall be entitled to earn or receive any return, income, price, or compensation whatsoever.

(U) That the works to be constructed, maintained, and operated under the permit shall not be owned, leased, trusteeed, possessed, or controlled by any device or in any manner so that they form part of, or in any way effect, any combination in the form of an unlawful trust, or form the subject of any unlawful contract or conspiracy

to limit the output of electric energy, or are in restraint of trade with foreign nations or between two or more States or within any one State in the generation, sale, or distribution of electric energy or other power.

(V) That any approval of any alteration or amendment, or of any map or plan, or of any extension of time, shall affect only so much of the stipulation or permit as is specifically covered by such approval; and that no approval of any such alteration, amendment, or extension shall operate to alter or amend, or in any way whatsoever be a waiver of any other part, condition, or provision of the stipulation or permit.

(W) That the permit shall be subject to all prior valid claims and permits which are not subject to the occupancy and use authorized under the permit applied for.

Reg. L-15. During the progress of construction amendments to maps of location or plans of structures will be required from the permittee if there is to be a material deviation from the maps or plans as originally filed, but no deviation will be allowed which interferes with the occupancy and use of lands under existing permits or pending applications. Any approval of any such deviation, or of any amendment of a map or plan, or any extension of time shall be in the form of a supplemental stipulation and permit so drawn as to become a part of the original stipulation and permit and a substitute for the clauses amended. Any such approval shall apply only to the matter specifically covered thereby, and no such approval shall operate to alter or amend or be in any way a waiver of any other part, condition, or provision of the stipulation or permit.

If, after the completion of the project works, there are any deviations in location from those shown upon the original maps or approved amendments thereof, additional maps prepared in the manner prescribed for original maps of location will be required to be filed within six months after the completion of the project works showing the extent of such deviations and the final locations of such project works. Also upon the completion of the project works detailed working plans will be required of the works as constructed, except such parts as have been constructed in compliance with plans originally filed or approved amendments thereof. Such new or additional plans may be originals on tracing linen or Vandyke negatives of the permittee's own working plans. The plans of  
104 conduits, dams, and appurtenant structures must be complete; of power houses, only general layout plans are required.

Reg. L-16. An extension of the periods stipulated in the permit for beginning or completing construction and for beginning operation will be granted only by the written approval of the Secretary after a showing by the permittee satisfactory to the Secretary that beginning or completing construction and beginning operation has been prevented by engineering difficulties that could not reasonably have been foreseen or by other special and peculiar causes beyond the control of the permittee.

Reg. L-17. A final permit may be transferred to a new permittee under the following conditions and not otherwise: The proposed transferee shall file with the district forester of the district in which the lands under permit are situated the decree, execution of judgment, will, proposed contract of sale, or other written instrument upon which the proposed transfer is based, or a properly certified copy thereof, also an application by the proposed transferee in the form of a stipulation binding the proposed transferee to the performance of such new and additional conditions expressed therein as the Secretary may deem necessary; and thereupon the Secretary may, in his discretion, approve in writing the proposed transfer, and after such approval the transferee shall succeed to all the rights and obligations of the permittee, subject, however, to such new and additional conditions as shall have been embodied in such agreement and so approved.

Reg. L-18. If any person shall make a false engineer's affidavit under these regulations the Secretary may order that no map, field notes, plan, or estimate made by such person shall be received or filed while the order is in force. If any person or corporation for himself or itself or as the attorney, agent, or employee of another, shall offer or file any false engineer's affidavit, knowing the same to be false, the Secretary may order that no application for a power permit shall be filed by or received from the person or corporation so offending, either in his or its own behalf or as attorney, agent, or employee of another, and that no power permit shall be issued to such person or corporation while the order is in force.

Reg. L-19. Violation by a final permittee of any of the provisions of these regulations, or of any of the conditions of a permit issued to him thereunder, shall be sufficient ground for revocation of such permit; but attention is called to the statute under which these regulations are issued, which provides:

That any permission given by the Secretary of the Interior (Agriculture) under the provisions of this act may be revoked by him or by his successor in his discretion.

No final permit will be deemed to be terminated except upon formal revocation thereof by the Secretary and until the permittee shall have had a reasonable time—not to exceed 90 days—within which to show cause why such revocation should not be made.

Reg. L-20. Any power project under permit, or any part thereof, whether constructed or unconstructed, may be abandoned by the permittee upon the written approval of the Secretary after a  
105 finding by the Secretary that such abandonment will not tend to prevent the subsequent development of such project or part thereof so abandoned, and after the fulfillment by the permittee of all the obligations under the stipulation and permit, in respect to payment or otherwise, existing at the time of such approval. Upon such abandonment, after such approval thereof and fulfillment of existing obligations, so much of the stipulation and permit as relates to the abandonment project or part of a project will be formally revoked by the Secretary.

Rights of Way for Telephone, Telegraph, and Power-transmission  
Lines under the Act of March 4, 1911.

Reg. L-21. Rights of way over National Forest lands for telephone, telegraph, and power-transmission lines, under the act of March 4, 1911 (36 Stat., 1253), will be granted by the Secretary of Agriculture.

Reg. L-22. All applications for rights of way over National Forest lands for power-transmission lines or for telephone or telegraph lines, under the said act of March 4, 1911, shall be filed with the district forester of the district in which the lands to be occupied are situated and shall consist of—

- (A) The items specified in Regulation L-9;
- (B) Field notes of survey in triplicate;
- (C) Maps of location on tracing linen in duplicate with three print copies prepared in the manner prescribed for transmission lines in Regulation L-11. Each sheet of maps shall in addition be verified by an indorsement thereon in the following form:

STATE OF ———,  
County of ———, ss:

———, being duly sworn, says that beginning on the — day of —, 19—, and ending on the — day of —, 19—, he surveyed for ——— the location of a proposed — line described as follows: (Here describe the line by terminal and length), and that such survey is accurately represented upon this map and by the accompanying field notes.

———, Surveyor.

Sworn to and subscribed before me this — day of —, 19—.

Each sheet of the map must have an application indorsed thereon in the following form:

(Date) ———, 19—.

——— of ——— hereby applies, under the act of March 4, 1911 (36 Stat., 1253), and the regulations thereunder promulgated by the Secretary, United States Department of Agriculture, for right of way for a — line, the location of which is shown hereon.

———, Applicant.

Reg. L-23. The grantee shall, unless otherwise ordered by the Secretary, pay annually in advance a rental charge of \$5 for each mile or fraction thereof of National Forest land crossed by power-transmission lines.

Reg. L-24. If the right of way applied for is for telephone or telegraph lines, no rentals will be charged, but the applicant shall agree to furnish such facilities to Forest officers and to permit such reasonable use of its poles or lines as may be determined upon between the applicant and the district forester at the time of filing the application.



Reg. L-25. The applicant shall file, together with the application as required under Regulation L-22, a stipulation which, upon its approval by the Secretary of Agriculture, shall constitute and express the conditions under which the grant will be made. Such stipulation shall expressly bind the applicant:

(A) To construct its lines upon the locations shown upon the maps submitted with its application and to complete such construction within two years from the date of the grant of the right of way.

(B) To operate its lines continuously after construction is completed, unless upon a full and satisfactory showing that such continuous operation is prevented by unavoidable accident or contingency this condition is temporarily waived by the Secretary.

(C) To pay annually in advance such charges as may be fixed and required by the Secretary for power-transmission lines under these regulations.

(D) On demand of the Secretary to install at such places and maintain in good operating condition in such manner as shall be approved by the Secretary accurate meters, or other devices approved by the Secretary, adequate for the determination of the amount of power delivered over transmission lines under grant, or any part thereof; to keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Secretary; and to make a return during January of each year, under oath, of such of the records of measurements for the year ended on December 31, preceding, made by or in the possession of the grantee, as may be required, by the Secretary.

(E) That the books and records of the grantee, in so far as they contain information concerning the power-transmission lines under grant, or the power business conducted in connection therewith, shall be open at all times to the inspection and examination of the Secretary, or other officer or agent of the United States duly authorized to make such inspection and examination.

(F) On demand of the Secretary to maintain a system of accounting of the entire power business, conducted in connection with the power-transmission lines under grant, in such form as the Secretary may prescribe or approve, and to render annually such reports of the power business as the Secretary may direct: Provided, however, That if the laws of the State in which the power business or any part thereof is transacted require periodical reports from public-utility corporations under a uniform system of accounting, copies of such reports so made will be accepted as fulfilling the requirements of this clause.

(G) To protect all Government and other telephone, telegraph, and power-transmission lines at the crossing of and at all places of proximity to the grantee's telephone, telegraph, and power-transmission lines in a workmanlike manner, according to the usual standards of safety for construction, operation, and maintenance in such cases, and to maintain the telephone, telegraph, and power-transmission lines in such a manner as not to menace life or property.

107 (H) To clear and keep clear National Forest lands along the right of way for such width and in such manner as Forest officers may direct.



(I) To dispose to the satisfaction of the Forest officers of all brush, refuse, or unused timber on National Forest lands resulting from the construction, maintenance, and operation of its lines under the grant.

(J) To do everything reasonable within the power of the grantee, both independently and on request of the Forest officers, to prevent and suppress fires on or near the lands occupied.

(K) To pay the full value as fixed by the district forester for all timber cut, injured, or destroyed on National Forest lands in the construction, maintenance, and operation of the lines under grant.

(L) To indemnify the United States against any liability for damages to life or property arising from the occupancy or use of National Forest lands by the grantee.

(M) To sell power to the United States when requested at as low a rate as is given to any other purchaser for a like use at the same time and under similar conditions, if the grantee can furnish the same to the United States without diminishing the quantity of power sold before such request to any other customer by a binding contract of sale: Provided, That nothing in this clause shall be construed to require the grantee to increase permanent works or install additional generating machinery.

(N) To abide by such reasonable regulation of the service rendered and to be rendered by the grantee, whether in respect to the furnishing or transmitting of power or to the transmitting of communications by telephone or telegraph, and of rates of payment therefor, as may from time to time be prescribed by the State or any duly constituted agency of the State in which the service is rendered.

(O) That the lines to be constructed, maintained, and operated under the grant shall not be owned, leased, trustee, possessed, or controlled by any device or in any manner, so that they form part of or in any way effect any combination in the form of an unlawful trust; or form the subject of any unlawful contract or conspiracy to limit the output of electric energy; or are in unlawful restraint of trade with foreign nations, or between two or more States, or within any one State, in the generation, sale, or distribution of electric energy or in the transmission of communications by telephone or telegraph.

(P) That in respect to the regulation by any competent public authority of the service to be rendered by the grantee or of the price to be charged therefor, and in respect to any purchase or taking over of the works or business of the grantee, or any part thereof, by the United States or by any State within which the works are situated or business carried on, or by any municipal corporation of such State, no value whatsoever shall at any time be assigned to or claimed for the right of way granted, nor shall such right of way or grant ever be estimated or considered as property upon which the grantee shall be entitled to earn or receive any return, income, price, or compensation whatsoever.

Reg. L-26. The grantee shall not assign or transfer to any other person or corporation whatsoever the right of way granted, except with the approval in writing first obtained from the Secretary of Agriculture, or other proper officer of the United States, and upon terms and conditions prescribed in said written ap-

proval by said Secretary or other officer. The assignee or transferee under any such approval shall take and use the right of way subject to all terms and conditions in these regulations together with the original approved application and grant set forth, and subject to such additional terms and considerations as may be provided by such written approval of the transfer.

Reg. L-27. During the progress of construction amendments to maps of location will be required from the grantee, if there is material deviation from the maps as originally filed, but no deviation or amendment will be allowed which will interfere with the occupancy and use of National Forest lands under existing permits or grants under any of the right-of-way acts of the United States. If, after the completion of construction, there are any deviations in location from those shown upon the original maps or approved amendments thereof, additional maps prepared in the manner prescribed for original maps of location must be filed within six months after the completion of construction. Such maps shall show the extent of such deviation, and the final location of the telephone, telegraph, or power-transmission lines as constructed under the authority of the grant.

Reg. L-28. Grants of rights of way will be effective from the date on which the Secretary of Agriculture writes upon the face of the maps his approval thereof.

Reg. L-29. Upon breach by the grantee of any of the terms or conditions set forth in these regulations, or in the approved application, or in the grant, the United States may enforce appropriate remedy therefor by suit for specific performance, injunction, action for damages, or otherwise. And if any such breach shall be continued or repeated after 30 days' notice thereof given in behalf of the United States to the grantee, the right of way granted, together with all rights thereunder and all rental charges and other moneys paid thereon, may be forfeited to the United States by a suit for that purpose in any court of competent jurisdiction.

## Forms.

Form 58. (Revised to Mar. 1, 1913.)

United States Department of Agriculture.

Forest Service.

..... Water Power.

Name of Forest.

.....  
(Name of applicant.).....  
(Use applied for.).....  
(Date of priority of application.)

(Above blanks not to be filled by applicant.)

Application for Preliminary Power Permit.

The....., a corporation organized and existing under and by virtue of the laws of the State of....., and having its office and principal place of business at..... in the State of..... citizen.. of the United States and.. resident of the State of..... do.. hereby make application for a preliminary permit for..... months, covering certain lands of the United States within the..... National Forest in the State of....., as such lands are approximately shown upon a certain map executed by..... on the.. day of....., 191..., which map is filed herewith and made a part hereof. This application is made in order that..... may, upon the filing of a complete and final application in accordance with the regulations of the Secretary of Agriculture, secure a priority for said final application from the date of the filing of this preliminary application.

(Space for insertion of request for construction work if necessary to maintain water rights.)

.....  
.....  
.....  
.....  
In witness whereof..... ha.. caused this instrument to be executed this... day of ....., 191...

[Seal of Corporation.]

Attest:.....

.....  
.....  
.....  
*Secretary.*

Subscribed and sworn to before me this . . . day of . . . , 191 . .

[SEAL.]

Notary Public.

(Copies of this form may be obtained by application to the district foresters.)

Form 58a. (Revised to Mar. 1, 1913.)

United States Department of Agriculture.

Forest Service.

### Certification of Receipt of Application for Power Permit or Right-of-way Grant.

The within application of . . . . . for a . . . . . under the act of . . . . . was first received by me at . . . . . on . . . . . , 191 . . , having been found incomplete it was returned to the applicant and was again received on . . . . . The date of priority is . . . . .

District Forester.

The within application having been found incomplete when filed on . . . . . was returned to the applicant for correction with a letter of . . . . . , copy of which is attached hereto. The application was found complete as required by the regulation when examined by me on . . . . .

District Engineer.

If the application was complete when first received, cancel the portion of the form which is inapplicable. If returned for correction more than once, the additional dates should be written in the blanks and be initialed by the district forester or the district engineer, as the case may be. Use this form for both preliminary and final power applications and right-of-way grants.

110 Form 59 (revised to Mar. 1, 1913).

United States Department of Agriculture.

Forest Service.

Water Power.

(Name of Forest.)

(Name of applicant.)

(Use applied for.)

(Date of priority of application.)

## Preliminary Power Permit.

This preliminary power permit, issued this . . . day of . . . , 191 . . . , to the . . . Company, hereinafter called "the permittee," a corporation organized and existing under and by virtue of the laws of the State of . . . , and having its office and principal place of business at . . . in the State of . . . , witnesseth: That,

Whereas the permittee filed with the district forester at . . . , on the . . . day of . . . , 191 . . . , an application for a preliminary power permit, in accordance with the regulations of the Secretary of Agriculture, hereinafter called "the Secretary;"

And whereas the permittee, on the . . . day of . . . , 191 . . . , paid to the . . . National Bank of . . . (United States depository), to be placed to the credit of the United States, the sum of . . . dollars (\$ . . . ):

Now, therefore, the conditions of this permit are as follows:

Article 1. If the permittee shall, on or before the . . . day of . . . , 191 . . . , file with district forester at . . . , in the manner prescribed by the regulations of the Secretary, a complete and final application for a permit to occupy and use lands of the United States within the . . . National Forest, as shown upon a certain map executed by . . . , on the . . . day of . . . , 191 . . . , and made a part of the aforesaid preliminary application, for (1) . . . reservoirs to be located approximately as shown upon the aforesaid map; (2) . . . water conduits to be located between points of diversion and discharge, as approximately shown upon the aforesaid map; (3) . . . power-house sites to be located approximately as shown on the aforesaid map; and (4) . . . transmission lines to be located approximately as shown on the aforesaid map; then and thereupon said final application shall, with reference to priority of application, relate back and be effective as of the date of the aforesaid preliminary application; but final permit will not be issued unless the development proposed in the final application is in general accord with the most beneficial utilization of the resources involved and consistent with the public interest.

Art. 2. If the permittee shall include in said final application National Forest lands which comprehend developments not included within its preliminary application, the priority of its application for such additional lands shall date only from the date of the filing of said final application.

Art. 3. The permittee shall pay annually in advance from the 1st day of January, 191 . . . , until the date of the granting of the aforesaid final permit, to the . . . National Bank of . . . (United States depository) or such other Government depository or officer as may hereafter be legally designated, to be placed to the credit of the United States a charge for the priority rights granted under this permit, which charge shall be calculated from the "rental capacity of the power site," as defined in the regulations of the Secretary and as estimated at the time of granting this permit, at a rate

which shall be 10 cents per horsepower per year for the first full calendar year under this permit, and which shall increase by 10 cents per horsepower per year for each year thereafter until the date of the granting of final permit as aforesaid.

111 Art. 4. If any part of the aforesaid charge, payable as provided in article 2 hereof, shall, after due notice has been given, be in arrears for 60 days, then and thereupon this permit shall terminate and become void.

Art. 5. If upon the filing of the said final application a final power permit is granted by the Secretary to the permittee to occupy and use the aforesaid lands for the construction, maintenance, and, or, operation of the aforesaid works, and in accordance with the provisions of such final power permit, the permittee completes the construction and begins the operation of the aforesaid works, all payments made in consideration of this permit will be credited to the permittee and be applied to the payment of charges due or to become due after such beginning of operation under such final power permit: Provided, however, That if such final application provides for only a partial development of the power project or projects, as outlined in the aforesaid preliminary application and as protected by this permit, then only such proportional part of the aforesaid payments will be credited to the permittee as the amount of development provided for in said final application bears to the amount of development indicated in said preliminary application; if, however, after the filing of final application in the form and manner prescribed in the regulations of the Secretary, the Secretary does not grant a final power permit to the permittee, all payments made in consideration of this permit will be returned to the permittee.

Art. 6. This permit shall terminate and become void upon the date named in article 1 hereof, unless extended by the written consent of the Secretary, and such extension will not be granted unless the completion of the final application has been prevented by unusual climatic conditions that could not reasonably have been foreseen, or by some special or peculiar cause beyond the control of the permittee; and if at the date of the termination of this permit as named in article 1 hereof, or at the date of the termination of any extension of time as herein provided, the permittee has failed to present a complete and final application in the manner and in the form prescribed in article 1 hereof, then and thereupon the aforesaid priority shall be lost, and no other application, either preliminary or final, covering in whole or in part the same or adjacent lands will be accepted from the permittee for a period of one year subsequent to the date of the termination of this permit or to the date of the termination of any extension hereof.

Art. 7.<sup>1</sup> This permit shall give no right to begin construction of any kind or to cut or destroy any timber upon National Forest lands.

Art. 7. The permittee is hereby authorized to begin the construction of the following works:

---

<sup>1</sup> Cancel clauses not used.



.....  
 Art. 8.<sup>1</sup> This permit is subject to a ..... power permit  
 granted to ..... on the ..... day of .....,  
 19.., and having a priority date of ....., 19.., also to .....

.....  
 Art. 9. This permit is nontransferable.  
 In witness whereof I have hereunto set my name this .... day  
 of ....., 19...

.....  
*Secretary of Agriculture.*

Form 60. (Revised to Mar. 1, 1913.)

United States Department of Agriculture.

Forest Service.

..... Water Power.  
 (Name of Forest.)  
 .....  
 (Name of applicant.)  
 .....  
 (Use applied for.) (Date of priority of application.)  
 (Above blanks not to be filled by applicant.)

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*Application for Final Power Permit.*

The ....., a corporation organized and  
 existing under and by virtue of the laws of the State of .....,  
 and having its office and principal place of business at .....,  
 in the State of .....,  
 ....citizen.. of the United States and ....resident.. of the State  
 of ....., do.. hereby make application for per-  
 mission to occupy and use certain lands of the United States within  
 the ..... National Forest in the State  
 of ....., by constructing, maintaining, and, or,  
 operating thereon for the main purpose of the development of power,  
 the following project works:

(Cancel such of the four following items (a), (b), (c), (d) as  
 may not be applicable.)

(a) ....., dams approximately  
 (Masonry, earth, etc., diverting or storage.)  
 ..... feet in maximum height and approximately  
 ..... feet in maximum length, to form .....  
 ..... reservoirs to flood approximately .....

..... acres at spillway level,<sup>1</sup> in section .....  
 ....., township ....., range  
 ....., meridian, of which  
 total of ..... acres approximately .....  
 ..... acres are National Forest land, said dams and said reser-  
 voirs being designated, respectively, as follows: .....

(b) ..... water conduits, approximately .....  
 ..... miles in length, respectively,<sup>1</sup> crossings sec-  
 tions .....  
 township ..... range .....  
 ..... meridian, of which total of .....  
 ..... miles, approximately ..... miles will  
 cross National Forest land, said water conduits being designated,  
 respectively, as follows: .....

(c) ..... power houses and appurtenant struc-  
 tures to occupy approximately ..... acres, respect-  
 ively,<sup>1</sup> in section ..... township .....  
 ..... range .....  
 meridian, of which total of ..... acres, approxi-  
 mately ..... acres are National Forest land, said  
 power houses being designated, respectively, as follows: .....

(d) ..... transmission lines .....  
 ..... miles in length, respectively,<sup>1</sup> crossing sections .....  
 ..... township ..... range .....  
 ..... meridian, of which total of .....  
 ..... miles approximately .....  
 miles will cross National Forest land, said transmission lines being  
 designated as follows: .....

All as approximately shown upon certain maps and plans executed  
 by ..... on the .... day of ....., 19...  
 which maps and plans are filed together herewith and designated  
 as follows:

(Designate each original of map or plan as "Exhibit A,"

"Exhibit B," etc., following each such designation by the title of

<sup>1</sup> If land is unsurveyed, substitute for the description by legal sub-  
 divisions in paragraphs (a), (b), (c), and (d) the following: "Lo-  
 cated on certain lands described and shown by the maps and field  
 notes accompanying the application filed with the district forester on  
 the .... day of ....., 19..."

the map or plan, as "Exhibit A," Map of Location of, etc.;  
 "Exhibit .....," Plan of, etc.) .....

which maps and plans, together with certain field notes, estimates  
 and data, evidence of water rights, articles of incorporation,  
 113 etc., designated, respectively, as "Exhibit .....  
 ....., "Exhibit ....., "

..... are hereby made a part of this application.  
 This application has been prepared to be filed in accordance with  
 the regulation of the Secretary of Agriculture, in order that .....  
 ..... may obtain the benefits of the act of  
 Congress approved February 15, 1901, entitled "An act relating to  
 rights of way through certain parks, reservations, and other public  
 lands;" and the use and occupancy of National Forest lands for  
 which this application is made is desired in order to construct, main-  
 tain, and, or, operate thereon the aforesaid project works for the pur-  
 pose of developing power .....

(Add use to which power is to be put and  
 .....  
 any other purpose for which land may be desired.)

In witness whereof ..... ha... caused  
 this instrument to be executed this .... day of ....., 19...

[Seal of corporation.] .....

Attest:

.....,  
*Secretary.*

Subscribed and sworn to before me this .... day of ....., 19...

[SEAL.] .....

*Notary Public.*

(Copies of this form may be obtained from the district forester.)

60a. (Revised to Mar. 1, 1913.)

United States Department of Agriculture.

Forest Service.

*Form of Affidavit of Engineer to Accompany Application for Final  
 Power Permit.*

STATE OF .....,  
 County of ....., ss:

..... being duly sworn, says he  
 is the engineer of (or the person employed to make the surveys, col-

lect the data, make the estimates, and prepare the designs and plans by) the ..... Company; that the survey of the water conduits, transmission lines, reservoirs, and power-house sites as shown upon the maps filed together herewith and described as follows: .....

(Describe as in the application, Form 60.)

.....  
being a total length of water conduit of ..... miles,  
a total length of transmission lines of ..... miles,  
a total area of reservoir site of ..... acres, and a  
total area of power-house site of ..... acres was  
made by him (or under his direction) under authority of said  
..... Company; that said survey  
was commenced on ..... and completed on ..... 19...;  
that said survey represents the proposed final location of said water  
conduits, transmission lines, reservoir sites, and power-house sites,  
and that said survey is accurately represented upon the maps herein  
described; he further says that the notes of survey filed together here-  
with as Exhibit ..... are the notes of the above  
described survey; that said notes are a true and complete copy of an  
actual location survey made upon the ground by him (or under his  
direction) within the dates above named; and that all of said notes  
and no others were used in the preparation of the maps herein de-  
scribed; he further says that the plans of structures filed together  
herewith and described as follows: .....

(Describe as in the application, Form 60.)

114 were prepared by him (or under his direction) under author-  
ity of said ..... Company; that the  
designs as shown upon said plans represent safe, proper, and adequate  
structures for the full economic utilization of the power available  
for development at the location shown upon the maps herein de-  
scribed; and he further says that the data and estimates filed together  
herewith as Exhibit ..... were prepared by him (or  
under his direction) under authority of said .....  
..... Company; that the estimates shown in said Exhibit  
..... are based upon the said data, being all the data  
available therefor; and that said estimates represent, in his best judg-  
ment and belief, the amount of power that can be developed, under  
the condition specified, by the works shown upon the maps and plans  
herein described.

.....,  
*Engineer.*

Subscribed and sworn to before me this .... day of ....., 19...

[SEAL.]

.....,  
*Notary Public.*

NOTE.—This affidavit form is not to be placed upon map, plans, or other exhibits but is to be typewritten and filed as "Exhibit . . . . . of the application. See Regulation L-11 (J). If the above described work has been done by or under the direction of more than one engineer each should subscribe to an affidavit covering the part of the work for which he is responsible.

60b. (Revised to Mar. 1, 1913.)

United States Department of Agriculture.

Forest Service.

*Form of Certificate of Applicant to Accompany Application for Final Power Permit.*

I, . . . . ., do hereby certify that I am the . . . . . of the . . . . . Company; that . . . . ., who subscribed (respectively) to the foregoing affidavit. . . is (are) the engineer. . of (said company) the person. . employed by said company to do the work evidenced on the (respective) affidavit. .); that the survey of the water conduits, transmission lines, reservoirs, and power-house sites as shown upon the maps filed together herewith and designated as follows, . . . . .

(Designate as in affidavit.)

. . . . . the notes of survey as given in "Exhibit . . . . .," filed together herewith, the designs of structures as shown upon the plans filed together herewith and designated as follows: . . . . .

(Designate as in affidavit.)

the collection of data and the estimates of power as given in "Exhibit . . . . .," filed together herewith, were made under authority of said (company); that said (company) is fully authorized by its articles of incorporation to construct, maintain, and operate water conduits; transmission lines, dams, reservoirs, and power houses upon the location shown upon the above described maps, and of the design shown upon the above described plans; that said locations and said designs have been adopted by said (company) as the approximate final locations and the approximate final designs of said water conduits, transmission lines, dams, reservoirs, and power houses; that said estimates as shown by said "Exhibit . . . . . have been approved by said (company); and that in accordance with the regulations of the Secretary of Agriculture, the maps, plans, estimates, and data herein described have been prepared as a part of an application of said (company) dated . . . . .

19..., and bearing my signature (as .....  
of said company).

.....,  
..... of the Company.

[Seal of Company.]

Attest:

.....,  
Secretary.

115 Form 61. (Revised to Mar. 1, 1913.)

United States Department of Agriculture.

Forest Service.

....., Water Power.  
(Name of Forest.)

.....  
(Name of applicant.)

.....  
(Use applied for.) (Date of priority of application.)

*Power Stipulation.*

The ..... Company having on the ....  
day of ....., 19..., filed with the district forester at .....  
..... an application, in accordance with the regulations  
of the Secretary of Agriculture, for a permit to occupy and use cer-  
tain lands of the United States within the .....  
National Forest in the State of ..... and more  
particularly described in and shown by the maps and plans accom-  
panying said application and made a part thereof, upon which to  
construct, maintain, and operate certain project works described in  
said application for the purpose of storing, conducting, and, or, using  
water for developing power and for the purpose of transmitting said  
power does hereby, in consideration of and as a prerequisite to the  
approval of the said application and the granting of the permit ap-  
plied for, stipulate and agree as follows, to wit:

*Definition of Terms.*

Article 1. That the following terms wherever used in this stipula-  
tion shall have the meanings hereby in this article assigned to them,  
viz:

"Permittee" means the ..... Company,  
a corporation organized and existing under and by virtue of the laws  
of the State of ..... and having its office and  
principal place of business at ..... in the  
State of .....

"Secretary" means the Secretary of Agriculture of the United



States of America, or his successor, or his duly authorized representative, or such other officer or agent of the United States as may be legally designated.

"National Forest lands" means public lands of the United States reserved under the terms of the act of March 3, 1891 (26 Stat., 1095) as amended by the act of June 4, 1897 (30 Stat., 11).

"Permit," as used in this stipulation, means the final power permit applied for by the permittee upon the . . . day of . . . , 19. . . , in accordance with the regulations of the Secretary under the act of February 15, 1901 (31 Stat., 790), and in consideration of which this stipulation is filed with the district forester.

"Municipal purposes" means and includes all purposes within municipal powers as defined by the charter of the municipal corporation, where any such purpose is directly pursued by the municipal corporation itself with the primary object of promoting the security, health, good government, or general convenience of its inhabitants.

"Power business" means the entire business of the applicant or permittee in the generation, distribution, and delivery of power by means of any one power system, together with all works and tangible property involved therein, including freeholds and leaseholds in real property.

"Power system" means all interconnected plants and works for the generation, distribution, and delivery of power.

"Power project" means a complete unit of power development, consisting of a power house, conduit or conduits conducting water thereto, all storage or diverting or fore-bay reservoirs used in connection therewith, the transmission line delivering power therefrom, any other miscellaneous structures used in connection with said unit or any part thereof, and all lands the occupancy and use of which are necessary or appropriate in the development of power in said unit.

116 "Project works" means the physical structures of a power project.

"Construction of the project works" means the actual construction of dams, water conduits, power houses, transmission lines, or some permanent structure necessary to the operation of the complete power project, and does not include surveys or the building of roads and trails, or the clearing of reservoir sites or other lands to be occupied, or the performance of any work preliminary to the actual construction of the permanent project works.

"Operation period" means the period covered by final permit subsequent to the actual beginning of operation.

"Survey-construction period" means the period covered by preliminary and final permits prior to the operation period.

"Nominal stream flow" means the sum of (a) the flow determined by averaging the values estimated for the natural mean flow for the two-month (calendar) minimum-flow period in each successive five-year period or major fraction thereof and (b) the stream flow made available from storage not by the project works.

"Load factor" means the ratio of average power output to maximum power output.

"Total capacity of the power site" means the continued product of (1) the factor 0.08;<sup>1</sup> (2) the average effective head, in feet; (3) the stream flow estimated to be available at the intake (in second-feet and in amount not to exceed the maximum hydraulic capacity of the project works) considered as the sum of (a) the nominal stream flow and (b) stream flow made available from storage by project works; and (4) a factor, not less than the average load factor of the power system, representing the degree of practicable utilization of the stream flow estimated to be available and based on the extent of practicable fore-bay storage and the load factor of the power system.

"Rental capacity of the power site" means the capacity on which the rental charges are based. Unless otherwise ordered by the Secretary, it will be determined by making the following deduction from the total capacity of the power site:

(a) Whenever power projects include conduit sites not wholly on National Forest lands, a deduction will be made from that part of the total capacity of the power site which is due to the use of the nominal stream flow. This deduction will be, in per cent, the sum of (1) the product of the proportion of the average effective head obtained from the dam by the per cent of submerged lands below the flow line fixed by the average effective head that are not National Forest lands, and (2) the product of the proportion of the average effective head obtained from the water conduit (from intake to tail-race outlet) by the per cent of the length of said conduit which is not located on National Forest lands.

(b) Whenever power projects include reservoir sites not wholly on National Forest lands, a deduction will be made from that part of the total capacity of the power site which is due to the use of stream flow made available from storage by the project works. This deduction will be the per cent of the total area of the reservoir sites that is not National Forest land.

(c) From the total capacity of the power site which remains after deductions (a) and (b) have been made will be made a further deduction, which, in per cent, will be the product of the square of the distance of primary transmission in miles and the factor 0.001, but in no case will deduction (c) exceed 25 per cent.

#### Amendment of Maps and Plans.

Art. 2. To construct its works on the locations shown upon the maps and in accordance with the plans specifically described in its final application for permit, filed with the district forester at ..... on the .... day of ....., 19.., which said maps and plans are hereby made a part of this stipulation, and to make no material deviation from said locations or from said plans unless and

<sup>1</sup> The factor 0.08 represents the horsepower at 70 per cent efficiency of a second-foot of water falling through a head of 1 foot.

until maps or plans showing such deviation shall have been filed with the district forester and approved by the Secretary; and no deviation or amendment will be allowed which will interfere with the occupancy and use of National Forest lands under existing permits, or conflict with prior rights under pending applications.

117 Art. 3. To file, within six months after the completion of each part of the project works, as required in article 5 hereof, in the manner prescribed for original maps of location, maps showing the final location of such part of the project works as constructed, if such final location varies from that shown upon maps originally filed or upon approved amendments thereof; and to file also within six months of the completion of each part of the project works as aforesaid, in such manner as may be prescribed by the Secretary, detailed working plans of each part of the project works as constructed, except of such parts as have been constructed in compliance with the plans originally filed or approved amendments thereof.

#### Beginning and Completion of Construction and Beginning of Operation.

Art. 4.<sup>1</sup> To begin the construction of the aforesaid project works within the period of — months from the date of execution of the permit and thereafter diligently and continuously to prosecute such construction, unless such construction is temporarily interrupted by climatic conditions or by some special or peculiar cause beyond the control of the permittee.

Art. 4.<sup>1</sup> To begin the construction of the following several parts of the aforesaid project works within the several periods in this article provided, which periods shall begin on the date of execution of the permit and thereafter diligently and continuously to prosecute such construction, unless such construction is temporarily interrupted by climatic conditions or by some special or peculiar cause beyond the control of the permittee.

(1) Within — months, part 1, consisting of.....

Art. 5.<sup>1</sup> To complete the construction and begin the operation of the aforesaid project works within a period of — months from the date of execution of the permit.

Art. 5.<sup>1</sup> To complete the construction and begin the operation of the following several parts of the aforesaid project works within the several periods in this article provided, which period shall begin on the date of execution of the permit.

---

<sup>1</sup> Use the first form of articles 4 and 5 when but one complete power project is to be constructed and it is inadvisable to separate it into two or more units of construction. When several distinct power projects are involved, or where it may be desirable to divide a single power project into two or more units of construction, use the second form of articles 4 and 5. Cancel form not used.

(1) Within — months, part 1, consisting of.....

Art. 6. That it is understood, if at the date of the termination of any one of the periods specified in article 4 hereof, unless such period is extended by the written approval of the Secretary, after a showing by the permittee satisfactory to the Secretary that such beginning of construction of that part of the project works required to have been begun within such period has been prevented by the act of God, or by the public enemy, or by engineering difficulties that could not reasonably have been foreseen, or by other special and peculiar cause beyond the control of the permittee, that thereupon the permission to occupy and use National Forest lands for all parts of said project works, the construction of which has not been begun on said date shall terminate and become void; and that the permit, in so far as such parts of said project works are concerned, shall become of no effect.

Art. 7. That it is understood that the periods specified in article 5 hereof for the completion of construction and the beginning of operation of the several parts of the project works will be extended only upon the written approval of the Secretary, after a showing by the permittee satisfactory to the Secretary, that the completion of construction and beginning of operation has been prevented by the act of God, or the public enemy, or by engineering difficulties that could not reasonably have been foreseen, or by other special and peculiar cause beyond the control of the permittee; and if such extension be not approved, that thereupon the permission to occupy and use National Forest lands for such parts of said project works shall terminate and become void; and that the permit, in so far only as such parts of said project works are concerned, shall become of no effect.

Art. 8. That, except when prevented by the act of God, or by the public enemy, or by unavoidable accidents or contingencies,  
118 the permittee will, after the beginning of operation, continuously operate for the development of power the project works constructed, maintained, and, or, operated in whole or in part under the permit, unless upon a full and satisfactory showing of the reasons therefor this requirement shall be temporarily waived by the written consent of the Secretary.

#### Capacities of Power Site.

Art. 9. That the total capacity of the power site, permission for the occupancy and use of which, in whole or in part, has been applied for, shall, for the purposes of this stipulation, be deemed and taken to be.....horsepower, distributed as follows:.....

and that the part of the aforesaid total capacity which is due to the use of the nominal stream flow shall, for the purposes of this stipulation, be deemed and taken to be.....horsepower, distributed

as follows: .....

and that the part of the aforesaid total capacity which is due to the use of stream flow made available from storage by the project works shall, for the purposes of this stipulation, be deemed and taken to be.....horsepower, distributed as follows:.....

it being understood that if any approved alterations or amendments of the maps of location or plans of project works, as provided for in article 2 and article 3 hereof, or any permanent change in the nominal stream flow, due to storage or otherwise, shall result in an increase or decrease in the total capacity of the power site, or of either part thereof, or of both, as said capacities are hereinbefore taken, said increased or decreased power capacities shall, from the beginning of the calendar year next succeeding the date of such approval, or of such change in nominal stream flow, be deemed and taken to be, for the purposes of this stipulation, the capacities of the power site occupied and used, in whole or in part, under the permit; and it being further understood that if at any time not less than ten (10) years after the original or after the last preceding determination of the said total capacity of the power site, or of either part thereof, or of both, either the permittee or the Secretary, on the ground of the inaccuracy, insufficiency, or inapplicability of the data upon which said original or said last preceding determination or said capacities was made, shall apply for or give notice of review of said original or said last preceding determination, then and thereupon such review shall be taken by the Secretary and a redetermination of the capacities shall be made, and the said redetermined capacities shall, for the purposes of this stipulation, and from the beginning of the next calendar year, be deemed and taken to be the capacities of the power site occupied and used in whole or in part under the permit.

Art. 10. To pay annually in advance from the 1st day of January 191..., to the ..... National Bank of..... (United States depository) or such other Government depository or officer as may be hereafter legally designated, to be placed to the credit of the United States, a rental charge for the occupancy and use of the lands of the United States described and shown upon the maps hereinbefore referred to, which rental charge shall be calculated from the "rental capacity of the power site," as defined in article 1 hereof, at the following rates per horsepower per year:

For the unexpired portion of the calendar year and for the first full calendar year of the survey-construction period	\$0.10
and similarly for the operation period.....	
For the second full calendar year of each of said periods..	.20
For the third year.....	.30
For the fourth year.....	.40
For the fifth year.....	.50
For the sixth year.....	.60

For the seventh year.....	.70
For the eighth year.....	.80
For the ninth year.....	.90
For the tenth and each succeeding year.....	1.00

119 it being understood that said estimated rental capacity may be adjusted annually by the Secretary to provide for changes in ownership of lands in reservoir sites and on water conduit lines and for changes in length of primary transmission; and it being further understood that at any time not less than ten (10) years after the issuance of the permit, or after the last revision of rates of rental charge thereunder, the Secretary may review such rental rates and impose such new rental rates as he may decide to be reasonable and proper; provided that such rental rates shall not be so increased as to reduce the margin of income (including appreciation in land values) from the power project or projects under the permit over proper, actual, and estimated expenses (including reasonable allowance for renewals and sinking-fund charges) to an amount which, in view of all the circumstances (including fair development expenses and working capital) and risks of the enterprise (including obsolescence, inadequacy, and supersession), is unreasonably small; but the burden of proving such unreasonableness shall rest upon the permittee.

Art. 11. That it is understood that if the permittee completes the construction and begins the operation of each of the several parts of the aforesaid project works within the periods provided for in article 5 hereof or any approved extension thereof, then and thereupon all charges for the occupancy and use of National Forest lands for said part of said project works so completed and operated which have been paid prior to the date of such completion and operation will be credited to the permittee and will be applied to the payment of charges due at the date of such completion and operation or to become due thereafter.

Art. 12. That it is understood that if any part of the power developed by the project works under the permit is used by the permittee itself for irrigation as auxiliary to irrigation works owned and operated by the permittee, or for the temporary development of power to be used in the construction of permanent project works under permit to the permittee, such a proportional part of the full schedule charge for any calendar year will be credited to the permittee as the power developed by the project works and used for the purposes above named bears to the total output of the project works for said years; and that all amounts so credited will be applied to the cancellation of charges as they may thereafter become due.

Art. 13. That it is understood that if any part of the aforesaid rental charge, payable as hereinbefore provided, shall, after due notice has been given, be in arrears for six (6) months, then and thereupon the permit and the authority granted thereunder to occupy and use National Forest lands shall terminate and be void.

Art. 14. That the decision of the Secretary shall be final as to all matters of fact upon which the calculation of the capacities or charges depends.



*Records and Accounts.*

Art. 15. On demand of the Secretary to install at such places and maintain in good operating condition in such manner as shall be approved by the Secretary, free of all expense to the United States, accurate meters, measuring weirs, gauges, and, or, other devices approved by the Secretary and adequate for the determination of the amount of power developed by the project works and of the flow of the streams from which the water is to be diverted for the operation of said works, and of the amount of water used in the operation of said works, and of the amounts of water held in and drawn from storage; to keep accurate and sufficient records of the foregoing to the satisfaction of the Secretary, and to make a return during January of each year, under oath, of such of the records of measurements for the year ended on December 31, preceding, made by or in the possession of the permittee, as may be required by the Secretary.

Art. 16. That the books and records of the permittee, in so far as they contain information concerning the power project or projects under the permit, or the power business conduction in connection therewith, shall be open at all times to the inspection and examination of the Secretary.

Art. 17. Upon the demand of the Secretary to maintain in such form as the Secretary may prescribe or approve a system of accounting of the entire power business transacted in connection with the power project or projects under the permit and to render annually such reports of said power business as the Secretary may direct: Provided, however, That if the laws of the State in which the said power business or any part thereof is transacted require periodical reports from public utility corporations under a uniform system of accounting, copies of such reports so made will be accepted as fulfilling the requirements of this article.

120

*Miscellaneous Requirements.*

Art. 18. To protect all Government and other telephone, telegraph, and power transmission lines at crossings of and at all places of proximity to the permittee's transmission lines in a workmanlike manner according to the usual standards of safety for construction, operation, and maintenance in such cases, and to maintain the transmission lines in such manner as not to menace life or property.

Art. 19. To clear and keep clear all lands of the power project for such width and in such manner as the Secretary may direct.

Art. 20. To dispose of all brush, refuse, or unused timber on National Forest lands resulting from the construction and maintenance of the project works as may be required by the Secretary.

Art. 21. To build and repair roads and trails as required by the Secretary, whenever any existing roads or trails are destroyed or injured by the construction work or flooding under the permit, and to build and maintain necessary and suitable crossings, as required

by the Secretary, for all roads and trails which intersect the water conduit, if any, constructed, maintained, and operated under the permit.

Art. 22. To do everything reasonably within its power and to require of its employees, contractors, and employees of contractors to do all reasonably within their power, both independently and upon the request of the forest officers, to prevent and suppress forest fires upon and near the lands to be occupied under the permit.

Art. 23. To pay in advance, as required by the Secretary, to the United States depository or officer as above set forth in article 10 hereof, to be placed to the credit of the United States, the full value as fixed by the Secretary of all timber cut, injured, or destroyed on National Forest lands in the construction, maintenance, or operation of the project works.

Art. 24. To pay, on demand of the Secretary, to the United States depository or officer, as above set forth in article 10 hereof, to be placed to the credit of the United States, full value for all damage to the lands or other property of the United States resulting from the breaking of, or the overflowing, leaking, or seeping of water from the project works constructed, maintained, and, or, operated under the permit, and for all other damage to the lands or other property of the United States caused by the neglect of the permittee or that of its employees, contractors, or employees of contractors.

Art. 25. To indemnify the United States against any liability for damages to life or property arising from the occupancy or use of National Forest lands by the permittee.

Art. 26. To sell power to the United States, when requested, at as low a rate as is given to any other purchaser for a like use at the same time and under similar conditions, if the permittee can furnish the same to the United States without diminishing the quantity of power sold before such request to any other customer by a binding contract of sale: Provided, That nothing in this article shall be construed to require the permittee to increase its permanent works or to install additional generating machinery.

Art. 27. To abide by such reasonable regulation of the service rendered and to be rendered by the permittee to consumers of power furnished or transmitted by the permittee, and of rates of payment therefor, as may from time to time be prescribed by the State or any duly constituted agency of the State in which the service is rendered.

Art. 28. That upon demand therefor in writing from the Secretary the permittee will surrender the permit to the United States or transfer the same to such State or municipal corporation as the Secretary may designate, and on the conditions specified in this article, and will also give, grant, bargain, sell, and transfer with the permit (upon such demand and upon said conditions) all works, equipment, structures, and property then owned or held and then valuable or serviceable in the generation, transmission, or distribution of electrical or other power, and which are then dependent in whole or in part for their usefulness upon the continuance of the permit,

together with all interest in any leaseholds of operating property used in connection with the works under the permit, and all contracts for the sale and delivery of electrical or other power; that the Secretary may require such surrender, if the United States shall desire to take over the permit and properties or, whenever a substantial part of such property is situated elsewhere than on National Forest lands, he may designate as such transferee any State or municipal corporation which shall desire such transfer: Provided,

121 however, That no municipal corporation shall be so designated unless by condemnation it shall have acquired, or unless by proceedings in a court of competent jurisdiction it shall have been determined that such municipality has the right to acquire, such property situated elsewhere than on National Forest lands: And provided further, That no such municipal corporation shall be so designated unless it also has the power to acquire the said property and rights of the permittee in accordance with the following conditions; that such surrender or transfer shall be on condition precedent that the United States or such transferee shall first pay to the permittee the reasonable value of all said works, equipment, structures, and other tangible property, and in addition thereto a bonus of three-fourths of 1 per cent of such reasonable value for each full year of the unexpired term of the permit; that such reasonable value shall not include any sum for the permit, or for any other franchise or right granted by the United States, by any State, or by any municipal corporation, in excess of the amount (exclusive of any tax or annual charge) actually paid to the United States, or to such State or municipal corporation, as the compensation for the granting of such franchise or right, or any sum for any other intangible properties or values whatsoever, it being understood that all such intangible values shall be covered by the bonus herein provided for; that such reasonable value shall be determined by mutual agreement between the parties in interest, and in case they can not agree by a board of arbitration of three members, one of whom shall be named by the permittee and one by the transferee, the third shall be either the Secretary or some representative whom he may name; and that the reasonable value for the purposes of such determination, of such works, equipment, structures, and other tangible property shall be the cost of reproduction of such works, equipment, structure, and other tangible property under substantially the same conditions as existed at the time of the original construction and at prices for labor and material which shall be the average of such prices for the five years next preceding the date of valuation, less a percentage of such reproduction cost equal to the per cent of physical and functional depreciation of the existing work, equipment, structures, and other tangible property.

Art. 29. That in respect to the regulation by any competent public authority of the service to be rendered by the permittee or the price to be charged therefor and in respect to any purchase or taking over of the properties or business of the permittee or any part thereof by the United States, or by any State within which the works are situated or business carried on in whole or in part, or by any municipal

corporation in such State, no value whatsoever shall at any time be assigned to or claimed for the permit, or for the occupancy or use of National Forest lands granted thereunder, nor shall the permit or such occupancy and use ever be estimated or considered as property upon which the permittee shall be entitled to earn or receive any return, income, price, or compensation whatsoever.

Art. 30. That the works constructed, or to be constructed, maintained, and, or, operated under the permit, will not be owned, leased, trusted, possessed, or controlled by any device or in any manner so that they form part of, or in any way effect, any combination in the form of an unlawful trust, or form the subject of any unlawful contract or conspiracy to limit the output of electric energy, or are in restraint of trade with foreign nations or between two or more States or within any one State in the generation, transmission, distribution, or sale of electrical or other power.

In witness whereof the permittee has executed this stipulation on the ..... day of ....., 19...

[SEAL.]

By .....

Attest:

.....,  
*Secretary.*

Form 61b.

United States Department of Agriculture.

Forest Service.

*Acknowledgment.*

STATE OF ———,  
County of ———, ss:

On this .... day of ....., 19..., before me, a notary public in and for said county, duly commissioned and sworn, my  
122 commission expiring ....., 19..., personally came ....  
....., to me personally known,  
who being by me duly sworn, did depose and say that he resides in  
.....; that he is the .....  
..... of the ..... Co.;  
that the said company is the corporation which is described in and  
which executed the foregoing instrument; that he knows the seal of  
said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order, and the said ..... acknowledged  
said instrument to be the free act and deed of said corporation.

Witness my hand and official seal the day and year first above written.

[NOTARIAL SEAL.]

.....,  
*Notary Public.*

This form of acknowledgment should accompany all stipulations for final power permits, transmission-line permits, and right-of-way grants.

Form 62. (Revised to March 1, 1913.)

United States Department of Agriculture.

Forest Service.

..... Water Power.

(Name of Forest.)

.....

(Name of applicant.)

.....

(Use applied for.)

.....  
(Date of priority of application.)

*Final Power Permit.*

Whereas the ..... Company (hereinafter called "the permittee") filed with the district forester at ..... on the .... day of ....., 19.., in accordance with the regulations of the Secretary of Agriculture (hereinafter called "the Secretary") under the act of February 15, 1901, an application for permission to occupy and use, for the development, transmission, and distribution of power, certain lands of the United States within the ..... National Forest, in the State of ....., and more particularly described and shown by the maps, field notes, plans, estimates, and data accompanying the said application; and

Whereas the aforesaid maps and plans, as hereinafter specifically described, have been adopted by the permittee as the maps of the approximate final location, and as the approximate plans of the project works which the permittee proposes to construct under this permit; and

Whereas the permittee has paid to the ..... National Bank of ..... (United States depository), to be placed to the credit of the United States, the sum of ..... dollars (\$.....); and

Whereas the permittee on the .... day of ....., 19.., executed, and on the .... day of ....., 19.., filed with the district forester at ..... a stipulation required by the Secretary as a condition to the issuance of this permit:

Now, therefore, I ..... Secretary of Agriculture of the United States, in accordance with the authority conferred upon me by the act of February 15, 1901, do authorize the permittee, subject to the regulations of the Secretary and to the provisions hereinafter set forth, to occupy and use the lands herein-

before referred to, and to construct, maintain, and, or, operate thereon, for the purposes in article 1 below set forth, the following project works:

123 (Cancel such of the four following items (a), (b), (c), and (d) as may not be applicable.)

(a) ..... dams approximately  
(Masonry, earth, etc., diverting or storage.)  
..... feet in maximum height and  
approximately ..... feet in maximum  
length, to form ..... reservoirs to flood  
approximately ..... acres at spillway  
level (\*), in section ..... township  
..... range  
meridian, of which total of ..... acres  
approximately ..... acres are National  
Forest land, said dams and said reservoirs being designated, respectively, as follows: .....

(b) ..... water conduits approximately  
..... miles in length, respectively, (\*) crossing  
sections ..... township  
..... range  
meridian, of which total of ..... miles  
approximately ..... miles will cross  
National Forest land, said water conduits being designated, respectively, as follows: .....

(c) ..... power houses and appurtenant structures to occupy approximately ..... acres, respectively (\*), in section .....  
township ..... range ..... meridian, of which total of  
..... acres approximately ..... acres are National Forest land,  
said power houses being designated, respectively, as follows: .....

(d) ..... transmission lines ..... miles in length, respectively  
(\*), crossing sections ..... township ..... range .....  
meridian, of which total of ..... miles approximately .....

(\*) If land is unsurveyed, substitute for the description by legal subdivisions in paragraphs (a), (b), (c), and (d) the following: "Located on certain lands described and shown by the maps and field notes accompanying the application filed with the district forester on the ..... day of ....., 19..."



miles will cross National Forest land, said transmission lines being designated as follows: .....

.....  
 All as approximately shown upon certain maps and plans executed by ..... on the .... day of ....., 19.., which maps and plans are filed together herewith and designated as follows:

(Designate each original of map or plan as "Exhibit A," "Exhibit B," etc., following each such designation by the title of the map or plan, as "Exhibit A," map of location of, etc.; "Exhibit ....., " plan of, etc.)

.....  
 .....  
 .....  
 .....  
 which maps and plans, together with certain field notes, designated as "Exhibit ....."

Article 1. The project works to be constructed, maintained, and, or, operated under this permit shall be constructed, maintained, and, or, operated for the purpose of storing, conducting, and, or, using water for the development of power or for the purpose of the transmission and use of said power.

124 Art. 2. Unless sooner revoked by the Secretary this permit shall terminate and become void at the expiration of fifty (50) years from the date hereof, but at said expiration may be deemed to be an application by the permittee for a new permit to occupy and use such National Forest lands as are occupied and used under this permit: Provided, That the permittee shall, not less than two (2) or more than twelve (12) years prior to the termination of said fifty (50) years, formally notify the Secretary that it desires such new permit, and shall comply with all laws and regulations at such time existing governing the occupancy and use of National Forest lands for power purposes.

Art. 3. Any violation of or failure to comply with the provisions or conditions of any article of the aforesaid stipulation, whether or not such article provides that such violation or noncompliance shall result in the revocation of this permit, shall be deemed and taken to be a sufficient cause for such revocation; but it is understood that the statute under which this permit is issued provides

that any permission given by the Secretary of the Interior (Agriculture) under the provisions of this act may be revoked by him or by his successor in his discretion.

No revocation, however, of this permit either in whole or in part will be made until after due notice thereof has been served upon the permittee, and until after the permittee shall have been given a

reasonable time, not to exceed ninety (90) days after the service of said notice, within which to show cause why such revocation should not be made.

Art. 4. This permit, and the permission granted hereunder to occupy and use National Forest lands, may be transferred to a new permittee under the following conditions, and not otherwise: The proposed transferee shall file with the district forester of the district in which the lands to be occupied are situated the decree, execution of judgment, will, proposed contract of sale, or other written instrument upon which the proposed transfer is based, or a properly certified copy thereof; also an application by the proposed transferee in the form of a stipulation, binding the proposed transferee to the performance of such new and additional conditions expressed therein as the Secretary may deem necessary; and thereupon the Secretary may, in his discretion, approve in writing the proposed transfer, and after such approval the transferee shall succeed to all the rights and obligations of the permittee, subject, however, to such new and additional conditions as shall have been embodied in such stipulation and so approved.

Art. 5. Any power project, permission to construct which is granted by this permit, or any part of such project, may be abandoned by the permittee upon the written approval of the Secretary, after a finding by the Secretary that such abandonment will not tend to prevent the subsequent development or use of such power project, or part thereof so abandoned, and after the fulfillment by the permittee of all obligations under the aforesaid stipulation, in respect to payment, or otherwise, existing at the time of such approval.

Art. 6. Upon the voluntary abandonment of the occupancy and use of National Forest lands, as authorized by this permit (except as provided for in article 4 hereof), or upon the revocation of this permit, or upon the non-execution of a new permit at the termination of this permit, all permanent project works which have been constructed under the authority of this permit, such as reservoirs, dams, and operating mechanism, water conditions and operating mechanism, power houses, and other buildings shall become and remain the property of the United States, Provided, however, That if said revocation or abandonment shall, as provided for in the aforesaid stipulation, affect only a part of the project works, the construction of which is authorized by this permit, the provisions of this article shall apply only to such parts of said project works as are affected by such revocation or abandonment. The mechanical equipment of power houses shall remain the property of the permittee, and may be removed within a reasonable time, not to exceed six (6) months after such abandonment, revocation, or termination, unless other disposition of such equipment is approved by the Secretary.

Art. 7. This permit is subject to all prior valid claims and permits which are not subject to the occupancy and use hereby authorized.

In witness whereof I have hereunto set my hand this .... day of ....., 19..

.....,  
*Secretary of Agriculture.*

## UNITED STATES DEPARTMENT OF AGRICULTURE,

## Forest Service.

..... Water Power.

(Name of Forest.)

.....

(Name of applicant.)

.....

(Use applied for.)

.....

(Date or priority of application.)

*Transmission Line Permit.*

Whereas the ..... Company (hereinafter called "the permittee") filed with the district forester at ..... on the ..... day of ....., 19..., in accordance with the regulations of the Secretary of Agriculture (hereinafter called "the Secretary") under the act of February 15, 1901, an application for permission to occupy and use for the transmission of electric power certain lands of the United States within the ..... National Forest, in the State of ....., and more particularly described and shown by the maps and field notes accompanying the said application; and

Whereas the aforesaid maps, as hereinafter specifically described, have been adopted by the permittee as the maps of approximate final location of the transmission line.. which the permittee proposes to construct under this permit; and

Whereas the permittee has paid to the ..... National Bank of ..... (United States depository), to be placed to the credit of the United States, the sum of ..... dollars (\$.....); and

Whereas the permittee on the.....day of....., 19..., executed and on the ..... day of ....., 19..., filed with the district forester at..... a stipulation required by the Secretary as a condition to the issuance of this permit;

Now, therefore, I....., Secretary of Agriculture of the United States, in accordance with the authority conferred upon me by the act of February 15, 1901, do authorize the permittee, subject to the regulations of the Secretary and to the provisions hereinafter set forth, to occupy and use the lands hereinbefore referred to, and to construct, maintain, and operate ..... transmission line... thereon, as such transmission line ...is (are) approximately shown upon ..... certain maps and is (are) described, in certain field notes executed by ....., on the ..... day of ....., 19..., which maps and field notes are filed together herewith and designated as follows:.....

(Designate each original map as "Exhibit A," "Exhibit B," etc., following each such designation by the title of the map, as "Exhibit A," map of location of, etc. Also designate field notes as "Exhibit ....")

.....  
 .....  
 .....  
 .....  
 .....  
 .....

which maps and field notes are hereby made a part of this permit.

Article 1. Unless sooner revoked by the Secretary, this permit shall terminate and become void at the expiration of fifty (50) years from the date hereof, but at said expiration may be deemed to be an application by the permittee for a new permit to occupy and use such National Forest lands as are occupied and used under this permit; Provided, That the permittee shall, not less than two (2) or more than twelve (12) years prior to the termination of said fifty (50) years, formally notify the Secretary that it desires such new permit, and shall comply with all laws and regulations at such time existing, governing the occupancy and use of National Forest lands for power purposes.

126 Art. 2. Any violation of or failure to comply with the provisions or conditions of any article of the aforesaid stipulation, whether or not such article provides that such violation or non-compliance shall result in the revocation of this permit, shall be deemed and taken to be a sufficient cause for such revocation; but it is understood that the statute under which this permit is issued provides

that any permission given by the Secretary of the Interior (Agriculture) under the provisions of this act may be revoked by him or by his successor in his discretion.

No revocation, however, of this permit will be made until after due notice thereof has been served upon the permittee and until after the permittee shall have been given a reasonable time within which to show cause why such revocation should not be made.

Art. 3. This permit and the permission granted hereunder to occupy and use National Forest lands may be transferred to a new permittee under the following conditions, and not otherwise; the proposed transferee shall file with the district forester of the district in which the lands to be occupied are situated the decree, execution of judgment, will, proposed contract of sale, or other written instrument upon which the proposed transfer is based, or a properly certified copy thereof, also an application by the proposed transferee in the form of a stipulation binding the proposed transferee to the performance of such new and additional conditions expressed therein as the Secretary may deem necessary; and thereupon the Secretary may, in his discretion, approve in writing the proposed transfer, and

after such approval the transferee shall succeed to all the rights and obligations of the permittee, subject, however, to such new and additional conditions as shall have been embodied in such stipulation and so approved.

Art. 4. Any transmission line, permission to construct which is granted by this permit, or any part thereof, may be abandoned by the permittee upon the written approval of the Secretary, after a finding by the Secretary that such abandonment will not be contrary to the public interest and after the fulfilment by the permittee of all obligations under the aforesaid stipulation in respect to payment or otherwise, existing at the time of such approval.

Art. 5. Upon the voluntary abandonment of the occupancy and use of National Forest lands, as authorized by this permit (except as provided for in article 3 hereof), or upon the revocation of this permit, or upon the nonexecution of a new permit at the termination of this permit, all permanent works which have been constructed under the authority of this permit shall become and remain the property of the United States.

Art. 6. This permit is subject to all prior valid claims and permits which are not subject to the occupancy and are hereby authorized.

In witness whereof I have hereunto set my hand this . . . . day of . . . . ., 19...

.....,  
Forester.

Form 68.

# UNITED STATES DEPARTMENT OF AGRICULTURE.

## Forest Service.

..... Water Power.  
(Name of Forest.)

.....  
(Name of applicant.)

Transmission line.

.....  
(Date of priority application.)

127

Transmission Line Stipulation.

(Act of February 15, 1901.)

The.....  
Company, hereinafter called "the permittee," having on the.....  
day of . . . ., 19... , filed with the district forester at.....  
an application, in accordance with the regulations of the Secretary of  
Agriculture, hereinafter called "the Secretary," for a permit to oc-  
cupy and use certain lands of the United States within the.....

..... National Forest in the State of ....., and more particularly described in and shown by the maps accompanying said application, and made a part thereof, upon which to construct, maintain, and operate a certain transmission line, or lines, described in said application for the purpose of transmitting electric power, does hereby, in consideration of and as a prerequisite to the approval of the said application and the granting of the permit applied for, stipulate and agree as follows, to wit:

Article 1. To construct its transmission line or lines on the location shown upon the maps, specifically described in its final application for permit, filed with the district forester at ....., on the ..... day of ....., 19.., which said maps are hereby made a part of this stipulation, and to make no material deviation from said locations until maps showing such deviation shall have been filed with the district forester and approved by the Secretary; and no deviation or amendment will be approved which will interfere with the occupancy and use of National Forest lands under existing permits, or conflict with prior rights under pending applications.

Art. 2. To file within six (6) months after the completion of the transmission line or lines, as required in article 3 hereof, in the manner prescribed for original maps of location, maps showing the final location of each line or lines as constructed, if such final location varies from that shown upon maps originally filed or upon approved amendments thereof.

Art. 3. To begin the construction of the aforesaid line or lines within a period of ..... months from the date of the permit for which application has been made, and to complete the construction of said line or lines within the period of ..... months from said date.

Art. 4. That except when prevented by the act of God or by the public enemy or by unavoidable accident or contingency, the permittee will, after the beginning of operation, continuously operate for the furnishing or transmitting of electric power the transmission line or lines constructed, maintained, and operated in whole or in part under the aforesaid permit, unless upon a full and satisfactory showing of the reasons therefor this requirement shall be temporarily waived with the written consent of the Secretary.

Art. 5. To pay to the ..... National Bank of ..... (United States depository), or such other Government depository or officer as may hereafter be legally designated, to be placed to the credit of the United States a charge annually in advance during the decade beginning January 1, 19.., of ..... dollars (\$.....), being at the approximate rate of five dollars (\$5) per mile per annum, and during each succeeding decade an annual charge at such reasonable rate per mile as the Secretary may fix at the beginning of each such decade.

Art. 6. On demand of the Secretary to install at such places and to maintain in good operating condition in such manner as shall be approved by the Secretary accurate meters or other devices approved by the Secretary, adequate for the determination of the amount of power delivered over the transmission line or lines under permit, or



any part thereof; to keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Secretary; and to make a return during January of each year, under oath, of such of the records of measurements for the year ended on December 31, preceding, made by or in the possession of the permittee, as may be required by the Secretary.

Art. 7. That the books and records of the permittee, in so far as they contain information concerning the power transmission line or lines under permit, or the power business conducted in connection therewith, shall be open at all times to the inspection and examination of the Secretary, or other officer or agent of the United States duly authorized to make such inspection and examination.

Art. 8. On demand of the Secretary to maintain a system of accounting of the entire power business, conducted in connection with the power transmission line or lines under permit, in such  
128 form as the Secretary may prescribe or approve, and to render annually such reports of the power business as the Secretary may direct: Provided, however, That if the laws of the State in which the power business or any part thereof is transacted require periodical reports from public-utility corporations under a uniform system of accounting, copies of such reports so made will be accepted as fulfilling the requirements of this article.

Art. 9. To protect all Government and other telephone, telegraph, and power transmission lines at the crossing of and at all places of proximity to the permittee's transmission line or lines in a workmanlike manner, according to the usual standards of safety for construction, operation, and maintenance in such cases, and to maintain the transmission line or lines in such a manner as not to menace life or property.

Art. 10. To clear and keep clear National Forest lands along the transmission line or lines for such width and in such a manner as the Forest officers may direct.

Art. 11. To dispose to the satisfaction of the forest officers of all brush, refuse, or unused timber on National Forest lands resulting from the construction, maintenance, and operation of the transmission line or lines under permit.

Art. 12. To do everything reasonably within the power of the permittee, both independently and on request of the forest officers, to prevent and suppress fires on or near the lands occupied.

Art. 13. To pay the full value as fixed by the district forester for all timber cut, injured, or destroyed on National Forest lands in the construction, maintenance, and operation of the transmission line or lines under permit.

Art. 14. To indemnify the United States against any liability for damage to life or property arising from the occupancy or use of National Forest lands by the permittee.

Art. 15. To sell power to the United States when requested at as low a rate as is given to any other purchaser for a like use at the same time and under similar conditions, if the permittee can furnish the same to the United States without diminishing the quantity of power sold before such request to any other customer by a binding contract

of sale: Provided, That nothing in this clause shall be construed to require the permittee to increase permanent works or to install additional generating machinery.

Art. 16. To abide by such reasonable regulation of the service rendered and to be rendered by the permittee in the furnishing or transmitting of power and of rates of payment therefor as may from time to time be prescribed by the State or any duly constituted agency of the State in which the service is rendered.

Art. 17. That the line or lines to be constructed, maintained, and operated under the permit shall not be owned, leased, trusteeed, possessed, or controlled by any device or in any manner so that they form part of or in any way effect any combination in the form of an unlawful trust, or form the subject of any unlawful contract or conspiracy to limit the output of electric energy, or are in unlawful restraint of trade with foreign nations, or between two or more States, or within any one State, in the generation, sale, or distribution of electric energy.

Art. 18. That in respect to the regulation by any competent public authority of the service to be rendered by the permittee or of the price to be charged therefor, and in respect to any purchase or taking over of the works or business of the permittee, or any part thereof, by the United States or by any State within which the works are situated or business carried on, or by any municipal corporation of such State, no value whatsoever shall at any time be assigned to or claimed for the permit applied for, or for the occupancy and use of National Forest lands granted thereunder, nor shall such permit or such occupancy and use ever be estimated or considered as property upon which the permittee shall be entitled to earn or receive any return, income, or compensation whatsoever.

In witness whereof, the permittee has executed this stipulation on the....day of....., 191..

[SEAL.]

By .....

Attest:

.....  
*Secretary.*

129 Form 69.

United States Department of Agriculture.

Forest Service.

..... Uses.  
(Forest.)

.....  
(Name of applicant.)

..... (Use applied for.) (Date of application.)

*Stipulations, Telephone, Telegraph, Power-transmission Lines.*

(Act of Mar. 4, 1911.)

Whereas the ..... right of way applied for by ..... (hereinafter called "the grantee") under the provisions of the act of March 4, 1911 (36 Stat., 1253), is within the ..... National Forest, as shown by certain maps executed by ..... on the ..... day of ....., 19..., and filed in the office of the district forester at ..... State of ..... on ....., 19...; and

Whereas the regulations of the Secretary of Agriculture (hereinafter called "the Secretary"), under the above-named act of Congress, concerning rights of way for telephone, telegraph, and power-transmission lines, provide that whenever such rights of way are located upon National Forests, the grantee shall enter into such stipulations as the Secretary may require; and

Whereas the Secretary requires that the grantee shall enter into the stipulations hereinafter set forth;

Now, therefore, in consideration of the grant of the right of way applied for, the grantee.. do.. hereby stipulate and agree, and do.. bind himself, his heirs, executors, administrators, and assigns, and each of them, jointly and severally (themselves, their heirs, executors, administrators, and assigns, and each of them, jointly and severally) (itself, its successors and assigns), as follows, to wit:

ARTICLE 1. To construct its ..... line or lines on the location shown upon the maps, hereinbefore referred to, which said maps are hereby made a part of this stipulation, and to make no material deviation from said locations until maps showing such deviation shall have been filed with the district forester and approved by the Secretary; and no deviation or amendment will be approved which will interfere with the occupancy and use of National Forest lands under existing permits or grants under any of the right-of-way acts, or conflict with prior rights under pending applications.

ART. 2. To file within six (6) months after the completion of the ..... line or lines as required in article 3 hereof, in the manner prescribed for original maps of location, map showing the final location of the line or lines as constructed, if such final location varies from that shown upon maps originally filed or upon approved amendments thereof.

ART. 3. To complete the construction of the aforesaid line or lines within a period of ..... years from the date of the grant for which application has been made.

ART. 4. That except when prevented by the act of God or by the public enemy or by unavoidable accidents or contingencies, the grantee will, after the beginning of operation, continuously operate (for the furnishing or transmitting of electric power the transmission) (for the transmission of communications the telephone, tele-

graph) line or lines constructed, maintained, and operated in whole or in part under grant, unless upon a full and satisfactory showing of the reasons therefor, this requirement shall be temporarily waived with the written consent of the Secretary.

ART. 5. To pay to the ..... National Bank of ..... (United States depository), or such other Government depository or officer as may hereafter be legally designated, to be placed to the credit of the United States a charge annually in advance during the decade beginning January 1, 19... of ..... dollars (\$.....), being at the approximate rate of five dollars (\$5) per mile per annum, and during each succeeding decade an annual charge at such reasonable rate 130 per mile as the Secretary may fix at the beginning of each such decade.

ART. 6. On demand of the Secretary to install at such places and to maintain in good operating condition in such manner as shall be approved by the Secretary, free of all expense to the United States, accurate meters or other devices approved by the Secretary, adequate for the determination of the amount of power delivered over the transmission line or lines under grant, or any part thereof; to keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Secretary; and to make a return during January of each year, under oath, of such records of measurements for the year ending on December 31 preceding, made by or in the possession of the grantee, as may be required by the Secretary.

ART. 7. That the books and records of the grantee, in so far as they contain information concerning the ..... line or lines under permit, or the business conducted in connection therewith, shall be open at all times to the inspection and examination of the Secretary or other officer or agent of the United States duly authorized to make such inspection and examination.

ART. 8. On demand of the Secretary to maintain a system of accounting of the entire power business conducted in connection with the power-transmission line or lines under grant, in such form as the Secretary may prescribe or approve, and to render annually such reports of the power business as the Secretary may direct: Provided, however, That if the laws of the State in which the power business or any part thereof is transacted require periodical reports from public-utility corporations under a uniform system of accounting, copies of such reports so made will be accepted as fulfilling the requirements of this article.

ART. 9. To protect all Government and other telephone, telegraph, and power-transmission lines at the crossing of and at all places of proximity to the grantee's ..... line or lines in a workmanlike manner, according to the usual standards of safety for construction, operation, and maintenance in such cases, and to maintain the ..... line or lines in such a manner as not to menace life or property.

ART. 10. To clear and keep clear National Forest lands along the ..... line or lines for such width and in such a manner as the forest officers may direct.

ART. 11. To dispose to the satisfaction of the forest officers of all brush, refuse, or unused timber on National Forest lands resulting from the construction, maintenance, and operation of the ..... line or lines under grant.

ART. 12. To do everything reasonably within the power of the grantee, both independently and on request of the forest officers, to prevent and suppress fires on or near the lands occupied.

ART. 13. To pay the full value as fixed by the district forester for all timber cut, injured, or destroyed on National Forest lands in the construction, maintenance, and operation of the ..... line or lines under grant.

ART. 14. To indemnify the United States against any liability for damage to life or property arising from the occupancy or use of National Forest lands by the grantee.

ART. 15. To sell power to the United States, when requested, at as low a rate as is given to any other purchaser for a like use at the same time and under similar conditions, if the grantee can furnish the same to the United States without diminishing the quantity of power sold before such request to any other customer by a binding contract of sale: Provided, That nothing in this clause shall be construed to require the grantee to increase permanent works or to install additional generating machinery.

ART. 16. To abide by such reasonable regulation or the service rendered and to be rendered by the grantee, whether in respect to the furnishing or transmitting of power or to the transmitting of communications by telephone or telegraph, and of rates of payment therefor, as may from time to time be prescribed by the State or any duly constituted agency of the State in which the service is rendered.

ART. 17. That the ..... line or lines to be constructed, maintained, and operated under grant will not be owned, leased, trustee, possessed, or controlled by any device or in any manner so that they form part of or in any way effect any combination in the form of an unlawful trust; or form the subject of any unlawful contract or conspiracy to limit the output of electric energy; or are in unlawful restraint of trade with foreign nations, or between two or more States, or within any one State in the generation, sale, or distribution of electric energy, or in the transmission of communications by telephone or telegraph.

ART. 18. That in respect to the regulation by any competent public authority of the service to be rendered by the grantee or of the price to be charged therefor, and in respect to any purchase or taking over of the works or business of the grantee, or any part thereof, by the United States or by any State within which the works are situated or business carried on, or by any municipal corporation of such State, no value whatsoever shall at any time be assigned to or claimed for the grant applied for, or for the occupancy and use of National Forest lands granted thereunder, nor shall such grant or such occupancy and use ever be estimated or considered as property upon which the grantee shall be entitled to earn or receive any return, income, or compensation whatsoever.

ART. 19. That upon breach by the grantee of any of the terms or conditions set forth in this stipulation or in the grant, the United States may enforce appropriate remedy therefor by suit for specific performance, injunction, action for damages, or otherwise; and that if any such breach shall be continued or repeated after thirty (30) days' notice thereof, given to the grantee by the Secretary, the right of way granted, together with all rights thereunder and all rental charges and other moneys paid thereon, may be forfeited to the United States by a suit for that purpose in any court of competent jurisdiction.

.....  
 (Insert here any additional stipulations proposed in accordance with  
 Reg. L-24.)  
 .....

In witness whereof, the grantee has executed this stipulation on  
 the ..... day of ....., 19...

[SEAL.]

By .....

Attest:

.....,  
*Secretary.*

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### *Procedure.*

U. S. DEPARTMENT OF AGRICULTURE,  
 FOREST SERVICE,  
 Washington, D. C.

The following procedure and instructions are hereby established and issued to take effect February 24, 1913, governing the enforcement of the regulations of the Secretary of Agriculture relating to power projects and to telephone, telegraph, and power-transmission lines within the National Forests.

HENRY S. GRAVES,  
*Forester.*

Approved February 24, 1913.  
 JAMES WILSON, *Secretary.*

### *General Instructions.*

All applications for the occupancy and use of National Forest lands for the purpose of developing power will be filed with the district forester of the district in which the power is to be developed.

Applications for the occupancy and use of public lands outside the National Forests will also be filed with the district forester, but the applicant will be required to file with the local land office of the land district in which such lands are situated such maps and papers and such copies thereof as are required by the regulations of the Department of the Interior. Applications filed in error in the For-



ester's or supervisor's office will be forwarded to the district forester concerned.

### Preliminary Applications and Permits.

If an applicant desires to secure priority for his application during a time sufficient for the preparation of the maps, plans, and other data required to be filed with an application for a final power permit, he may do so by filing an application for preliminary permit. (See Reg. L-10 and Form 58.)

The preliminary permit will be granted for a definite limited period, which will vary according to the circumstances of the particular case, and will be only long enough to give a reasonable time for the preparation of a final application as prescribed in the regulations.

In general, such period will not exceed two years. If a longer time than this is applied for and approved in any case, a special report will be made by the district engineer showing the necessity for the longer period, which report will be submitted with the other papers in the case.

133 Whenever the time prescribed by the State statutes within which construction must begin in order to maintain water rights is insufficient to enable the applicant to prepare a final application before beginning construction, a clause may be inserted in the preliminary permit allowing construction to proceed to an extent sufficient to permit compliance with the State law. Only in exceptional cases will a clause be inserted allowing construction in advance of final application and permit for any other reason than to permit compliance with the State law, and when inserted for any other reason the necessity for it must be fully explained in the recommendation of the district forester.

No extension will be granted except upon the written approval of the Secretary of Agriculture after a satisfactory showing by the permittee of the reasons for such extension, and after a report has been submitted by the district forester.

To prevent speculative holding of sites under preliminary permits and to secure the presentation of the final application within the time named in the preliminary permit, an annual charge will be made during the term of the preliminary permit. The charge will be calculated on the basis of the estimated rental capacity of the power site to be occupied and at the rates prescribed in Regulation L-8. If the final application is filed in accordance with the terms of the preliminary permit, and if construction is completed and operation is begun in accordance with the terms of the final permit, the payments made under the preliminary permit will be credited upon payments due or to become due after the beginning of operation under the final permit.

The lines shown on the maps accompanying the final application will not be required to follow without change the lines as shown on the map accompanying the preliminary application, and the position and arrangement of conduits and power houses as shown upon the

map accompanying the preliminary application may be changed, if the detailed surveys preceding the final application show such change to be desirable; but priority from the date of filing of the preliminary application will be allowed for only so much of the projects shown in the application for final power permit as is within the approximate limits of diversion and discharge as shown in the application for the preliminary power permit. (Reg. L-3.)

Upon the failure of the permittee to comply with the terms of a preliminary permit the district forester will write him a letter calling his attention to the violation of the terms and notify him that by reason thereof the permit expired on a given date and the priority acquired thereby was lost. Copies of this letter of notification should be sent to the supervisor and to the Forester. If a preliminary permit is thus terminated, no other application for a permit either preliminary or final covering the same or adjacent lands will be received from the same applicant for a period of one year subsequent to the termination of the preliminary permit.

The date upon which priority of application is established shall be the date of the filing in the office of the district forester of the last map or paper necessary to constitute a complete application as required by Regulation L-10. The date and hour of the receipt of a preliminary application will be inserted in the space provided on the form (Form 58a) and will be certified by the signature of the

134 district forester. Upon the receipt of preliminary applications, with their accompanying maps and papers, the district engineer will examine them in the order of their receipt, as certified by the district forester, with a view of determining whether the application is complete as required by the regulations. If complete, the district engineer will certify the fact in the space provided on the form. If incomplete or insufficient, the district engineer will prepare for the signature of the district forester a letter to the applicant returning the application and its accompanying papers, with a detailed statement of the incompleteness or insufficiency. A carbon copy of this letter certified by the signature of the district engineer will be attached to and filed with the papers in the case. Upon the return of the amended papers the date and hour of their receipt will be certified by the district forester in the same manner as when they were originally received. Upon the receipt of the amended papers the district engineer will examine them, and if found complete as required by the regulation he will certify the fact in the space provided on the form.

After certifying that the application is complete, as prescribed by the regulation, the district engineer will examine the maps and estimates, using such additional data as he may be able to secure, will determine the approximate rental capacity of the power site, and will submit a report and recommendations to the district forester. A field examination by the district engineer will be made only when it is necessary in order to secure sufficient information on which to base the report and recommendations.

Upon receiving the district engineer's report, the district forester will prepare five copies of permit on Form 59. If the application is

approved by the district forester and the district engineer, they will initial the permit. The district forester will send the chief engineer a copy of the complete application, the original map on tracing linen, one print copy, one copy of the district engineer's report, the original, and one copy of the permit, and the correspondence file. The district forester will also send the supervisor a print copy of the map.

The chief engineer will examine all the papers received from the district forester and, if he approves the application, the recommendations of the district forester and the district engineer's report, he will initial the original permit and return it with the original map on tracing linen and the correspondence file to the district forester. If he does not approve either the application, or the report, or the recommendations, he will return the original permit without initial and with a letter to the district forester explaining in detail his reasons for not approving.

Upon the return of the permit from the chief engineer, if approved, the district forester will, except as hereinafter provided, prepare a letter of transmittal (Form 861) in triplicate, stating the amount of the charge, and will accompany it by a letter informing the applicant that priority will be lost unless payment is received within 60 days of the date of the letter. The original will be sent to the applicant, and upon receipt of notice from the district fiscal agent that deposit has been made the district forester will forward to the Forester on-print copy of the map, one copy of the report of the district engineer, the original, and one copy of the permit, and the correspondence file.

135 When the original permit has been signed by the Secretary, the Forester will return it, together with the correspondence file, to the district forester.

Before transmitting the original permit to the permittee the district forester will inform the chief engineer by letter of the dates of signing and the signature on the permit. He will also send the supervisor a copy of the permit, a copy of the complete application (except the papers required under Reg. L-9), a copy of the report of the district engineer, and a copy of the letter of transmittal (Form 861), with an indorsement thereon of the receipt of the first payment.

When the application includes, in addition to National Forest lands, lands under the jurisdiction of the Interior Department, the district forester shall, upon the completion of the application, immediately inform the local land office of such completion and of the date of priority and shall send a carbon copy of such letter to the applicant. The date so notified will be taken as the date of priority before both the Department of Agriculture and the Department of the Interior.

In preparing reports upon applications including both National Forest lands and Interior Department lands the district engineer will calculate the total capacity of the power site and the rental capacity of the National Forest lands, leaving to the Geological Survey the computation of charges for the Interior Department lands. The district forester will then submit the case to the chief engineer, including, in addition to the papers usually required for

both the chief engineer and the Forester, one copy each of the permit and of the district engineer's report.

The chief engineer will examine the papers received from the district forester, and, if he approves the application, report, and recommendations, will initial the original of the permit, and after retaining the papers required for his own file will submit the remainder directly to the Forester.

Upon the receipt of the papers the Forester will forward to the Geological Survey the extra copy of the permit and of the district engineer's report, together with a statement of the recommendations which the Forest Service proposes to make. If the Geological Survey approves the calculations of the district engineer and the terms of the permit, as applied to the Interior Department lands involved, the Forester will so inform the district forester, who will thereupon prepare and submit the letter of transmittal (Form 861) to the applicant for the advance charge for the use of National Forest lands only. Thereafter the case will be handled by the Forest Service as if only National Forest lands were involved.

If the Geological Survey should not approve the calculations and recommendations if applied to the Interior Department lands, and it should seem advisable to make alterations or corrections in either the permit or the report as applied to the National Forest lands, the Forester will return the papers through the office of the chief engineer to the district forester, with a statement of the corrections or alterations desired. When such changes have been made the district forester will prepare the letter of transmittal and handle the case as before.

#### *Final Applications and Permits.*

If, in accordance with the terms of a preliminary permit, a final application is filed in the form prescribed by Reg. L-11, such final application shall, with reference to priority, relate back and be effective as of the date of the preliminary application. The date upon which priority of application is either maintained in accordance with a preliminary permit or established by final application in the absence of a preliminary permit shall be the date of the filing in the office of the district forester of the last map or paper necessary to constitute a complete application as prescribed in the regulation. The date and hour of the receipt of an application will be inserted in the space provided on Form 58a, and will be certified by the signature of the district forester. Applications will be examined by the district engineer in the order of their receipt as certified by the district forester. The application and its accompanying papers, especially the plans of project works and the estimates and data, will be carefully examined with a view to determine whether they are in complete and proper form and contain all the information required by the regulation. If complete, the district engineer will certify to the fact in the space provided on the form.

If any of the papers required by the regulation are incomplete or insufficient or if there have been any omissions the district engineer

will prepare for the signature of the district forester a letter to the applicant explaining the incompleteness or insufficiency or omissions, and returning for completion or correction any papers which are not in proper form. A carbon copy of this letter certified by the signature of the district engineer will be attached to and filed with the papers in the case. Upon the receipt of the amended or additional papers the date and hour of such receipt will be certified by the district forester in the same manner as when they were originally received. They will be reexamined by the district engineer and if found complete, as required by the regulation, he will certify the fact in the space provided on the form.

Upon the receipt of a final application for the use of an area which is in whole or in part included in an existing final permit previously issued, the district forester will return the application to the applicant and will inform him fully of the existing permit and of the extent to which his application is in conflict therewith. The applicant may then amend his application to avoid such conflict or may renew his application should the priority of application be lost by the prior applicant. If the final application is an original filing or is filed in accordance with the terms of a subordinate preliminary permit and such filing is made before the filing of final application by a prior preliminary permittee the district forester will retain the application, but will suspend action thereon until after the filing of final application by the prior preliminary permittee or until after the termination of the preliminary permit. When the prior permittee has filed final application, if it is found that the application first in time is in conflict with the application first in right the district forester will return the former to the applicant and will inform him fully of the extent to which his application is in conflict with that of the prior permittee. The first-named applicant may then

137 amend his application to avoid such conflict or may renew his application should the priority of application be lost by the other applicant. (See Reg. L-3.)

When the district engineer has certified that the application is complete as required by the regulation the district forester, after making such additional prints of maps and plans as may be necessary, will forward to the forest supervisor two prints of the maps of location, a copy of the notes of survey, and such other papers as may be necessary. If the application was not accompanied by a certificate from the supervising engineer of the Reclamation Service that the occupancy and use of the lands applied for will not interfere with any project of the Reclamation Service, the district forester will forward a print of the general map of location (see Reg. L-11, (G), (5)) to the supervising engineer concerned and request him to state whether the occupancy of the land for power purposes will interfere with any project of the Reclamation Service.

Upon the receipt of the maps and other papers the supervisor will forward a print of the maps of location to the ranger, will cause an immediate examination to be made for the purpose of estimating the amount of timber to be cut or destroyed, and will report to the district forester on Form 578b. Reports on Form 964 will be required



in power cases only where no examination and report by a district engineer will be made.

Upon the receipt of a complete application the district engineer will make such field examination of the project as may be necessary and will collect all information and data bearing upon the case that may be available. If practicable, this examination will be made at the same time as the supervisor's. Only in exceptional instances when the district engineer is thoroughly familiar with the project will the field examination be omitted. In this examination the district engineer will determine whether in his judgment the project as applied for will make a reasonably full development of the power available at the sites covered by the application.

After the completion of the examination and the collection of the data the district engineer will submit a report to the district forester. The report will describe the project in detail, with its relation to other projects of the same or allied or competing companies; state whether the project comprehends a full development of the available power; describe the market for the power and the general market conditions in the district, so far as such information is available, and the relation of the power development to other interests, particularly irrigation. The report should present detailed estimates of the amount of power that will probably be developed and the complete data upon which such estimates are based. The report should designate the several items necessary for filling the blanks of the stipulation and permit, a recommendation of the total power capacity to be inserted in the stipulation, and such other recommendations as may seem desirable. The report should be complete with respect to the history of the case and its connection with other cases, and to all pertinent, general, and special information, so that a full understanding of the case may be had and action taken without the necessity of referring to other papers except for purposes of verification. The report should also contain such sketch maps, topographic quadrangles, photographs, etc., as will be of assistance in giving a full understanding of the case. All the data filed with the appli-

138 cation and all other data collected which have a bearing upon the case and upon the computation of capacities should be collated in tabular form in the report. This instruction should be rigidly adhered to, since it will be extremely important at the 10-year revision period to have in their original form the exact and complete data upon which the original calculations are based. If the chief engineer in reviewing the report of the district engineer makes alterations or corrections, or reaches different conclusions with respect to power capacity or otherwise, the report of the district engineer should be corrected accordingly before the case is submitted to the Forester; but if the district engineer, upon a reexamination of the case, disagrees with the changes made by the chief engineer, he may so state in his report, giving the reasons therefor, and he will not, to such extent, be considered responsible for the report.

Under Regulation L-7 the term "construction of the works" excludes all such preliminary work as surveys, road and trail building, clearing of land, etc. It will therefore be necessary, in inserting the



lengths of periods in article 4 of the stipulation, to allow a time before construction must begin reasonably sufficient for the completion of all necessary preliminary work. It will be advisable, in general, to confer with the applicant before fixing the time limits, with the view of agreeing upon such limits as will be satisfactory to the applicant while at the same time properly protecting the public interests.

Articles 4 and 5 of the power stipulation have been drawn for the purpose of allowing permittees to make progressive developments of two or more power projects upon the same stream or watershed if they so desire. Each division of the works as taken in these clauses should in general constitute a complete operating unit or power project. But where, for example, it may be the applicant's intention to construct several storage reservoirs not directly connected with the water conduits, each reservoir may be, and in general should be, taken as a distinct division of the works. Water conduits and the diverting dams and power houses connected therewith should never be separated.

Particular care should be exercised in the determination of the total capacity of the power site. All the available data should be secured, and where storage is to be used some graphical method, as that of Rippl or Hill, should be employed. (See Mead's Water Power Engineering.) The district engineer should review carefully the estimates presented by the applicant and compare the same with his own independent estimates.

From the fact that probably in many instances the data for the original calculations will be meager, provision is made in Regulation L-8 for a redetermination of the power capacity by 10-year intervals to admit of utilizing more complete data and to allow for possible change of conditions.

Upon receiving the district engineer's report the district forester will prepare five copies of the stipulation on Form 61 and five copies of the permit on Form 62. If the application is approved by the district engineer and the district forester, they will initial the file copies of the stipulation and the permit. The district forester will send the chief engineer a copy of the complete application, one copy of the district engineer's report, the original maps and plans on tracing linen, with one print copy of each, the correspondence file, the letter from the supervising engineer of the Reclamation Service and the original, and one copy of the stipulation and of the permit.

If, because of field conditions or other reasons, the supervisor has been unable to make his report on timber (Form 578*b*) by the time the other papers are ready for transmittal, the case should not be delayed on that account but be forwarded immediately, and the Form 578*b* submitted later.

The chief engineer will examine the papers received from the district forester, together with the matter submitted in the application. He will return to the district forester the original maps and plans on tracing linen, the correspondence file, the letter of the supervising engineer of the Reclamation Service, and the original copies of the

stipulation and the permit. If he concurs in the recommendations of the district forester and the district engineer, he will initial the original copies of the stipulation and the permit. If he does not concur, he will return them without his initial and with a letter to the district forester explaining his reasons for not concurring.

The district forester will send the applicant two copies of the stipulation, and, when necessary, a form (319) for corporate officer's authority, with the request that one copy of the stipulation be duly executed and returned to him. He will also send with the stipulation a statement on Form 861 of the amount of the first year's rental charge and will by letter inform the applicant that any priority established under his application will be lost if the rental charges are not paid and the stipulation is not executed and returned within 90 days from the date of the letter accompanying it, unless such time is extended by the written authority of the Secretary of Agriculture.

After the duly executed stipulation has been returned and has been initialed by the assistant to the solicitor, and after notice of payment is received the district forester will submit to the Forester one copy of the complete application, one copy of the report of the district engineer, the original and one copy of the stipulation, the original and one copy of the permit, the correspondence file, and the letter of the supervising engineer of the United States Reclamation Service.

If any material changes are made in the stipulation and permit after they have been returned to the district forester by the chief engineer, all papers in the case will be resubmitted to the chief engineer before being finally submitted by the district forester to the Forester.

Upon receipt of the complete papers in the case the Forester will submit them with his recommendations to the Secretary of Agriculture. When the permit has been signed by the Secretary the Forester will retain one copy of the permit, one copy of the stipulation, the district engineer's report, and one print of the general map of location (see Reg. L-11 (G), (5)) and will return all the other papers in the case, including the signed original permit, to the district forester.

Upon transmitting the original permit to the permittee the district forester will inform the chief engineer by letter of the dates of signing and the signatures on the stipulation and permit. He will also send the supervisor a copy of the complete application (except the papers required by Regulation L-9, and except the print map of location and the copy of the field notes which have been previously sent), a copy of the report of the district engineer, one copy of the stipulation, one copy of the permit, and a copy of the letter of transmittal (Form 861), with an indorsement thereon of the payments made.

If the final application involves both National Forest and Interior Department lands, the case will be handled in a manner similar to that outlined for preliminary application (see p. 53).

All recommendations by the district forester for cancellation of permit, either in whole or in part, and all recommendations for ap-

proval or disapproval of applications for extension of time, either for beginning or completing construction, shall be accomplished by a report setting forth in detail the reasons for such recommendations, and shall be submitted to the Forester through the chief engineer. Whenever engineering difficulties are involved the district engineer shall make such examination as is necessary, and shall prepare a report to accompany the recommendations of the district forester.

On November 15 of each year the district forester will prepare and send by registered mail to each permittee a statement of account (Form 64). This statement will show the amount of the charge for the succeeding calendar year, and the credit, if any, on account of previous payments. If a balance is due from the permittee the statement will be accompanied by a letter of transmissal (Form 861). The district forester will retain two carbons of the statements and the Form 861, and will file them, together with the registry receipt, with the other papers in the case. Upon the receipt from the district fiscal agent of the notice of payment the date of such payment should be indorsed upon the file copies of the Form 861. The original Form 861, with the customary indorsement thereon of payment, will be sent to the permittee, and one copy of the statement and of the Form 861 will be sent to the supervisor for his files.

If the works are completed and operation begun at or prior to the time specified in the stipulation, the minimum rate of 10 cents per horsepower per annum will apply from such date proportionately to the fractional part of the calendar year succeeding such date, and also to the following full calendar year, and the rate will be increased each year by 10 cents per horsepower until the rate of \$1 is reached, and will then remain at that rate until the expiration of the permit. All payments made previous to the beginning of operation will be applied on payments due or to become due at and after that time.

In order that the district forester may know whether the terms of the stipulation and permit are being complied with, the supervisor should keep himself fully informed of the progress of the work. He shall immediately upon the date specified in the stipulation upon which construction should begin make an examination and report to the district forester whether the construction has begun. The supervisor should ascertain from time to time thereafter whether the works are being constructed with due diligence and in substantial agreement with the maps and plans, and in case of doubt should call for an examination by the district engineer. He shall also immediately on the date specified in the stipulation upon which operation should begin make an examination and report to the district forester whether such operation has begun.

141 In order that the district forester may be informed of the power situation in the whole district the supervisors will forward from time to time whatever information they are able to collect, formally or informally, concerning costs of generation of power, the returns from its sale, the interrelations of the various companies, transfers of rights, water locations, etc. The date and source of all such information should be given with the supervisor's opinion of its reliability.

### Semicommercial Power Projects.

Power projects of a semicommercial nature will be regarded as commercial except in so far as a satisfactory showing of partial noncommercial use may be made to the district forester by the permittee.

The application, procedure, and rental charges will be the same as for commercial power projects except that the charge will be based upon the rental capacity of the power site after a proper credit has been given for the amount of power used for noncommercial purposes. (See Reg. L-8.) The credit so given will be such proportion of the preceding year's schedule charge (before any credits have been applied thereto) as the amount of power used for noncommercial purposes during the preceding year bears to the total amount of power developed during such year. The amount of the credit will be determined from statements submitted to the district forester by the permittee, or, if necessary, from an examination of the permittee's books (see Reg. L-14 (G), (H)), or from an investigation by the district engineer.

The data for determining the credit will be obtained each year by November 15, in order that the district forester may be prepared to send to the permittee at that time a statement of account, accompanied by a letter of transmittal (Form 861), if a balance is due from the permittee. In arriving at the deduction to be made for any year, data shall be used for the 12 months next preceding the date of determination.

### Application and Permit for Power Projects of 100 Horsepower Total Capacity or Less.

Permits for the occupancy and use of power sites having a total capacity of 100 horsepower or less will be issued by the district forester. (Reg. L-1). No charge will be made for such permits.

Applications in writing will be filed with the district forester and must conform to the requirements of Regulation L-12.

When the application is received the district forester will indorse thereon the date of its receipt. The application will be examined by the district engineer to determine whether it conforms to the requirements of the regulation and whether the total capacity of the site is 100 horsepower or less. If the capacity is found to be in excess of 100 horsepower the application will be returned and the applicant informed that an application in the form prescribed by Regulation L-10 or L-11 will be required. If the application is complete and the total capacity is 100 horsepower or less the district forester will

send the supervisor two print maps of location and a copy of the notes of survey and such other papers as may be necessary.

If the application is not accompanied by a certificate from the supervising engineer of the Reclamation Service that the proposed works will not interfere with any project of the Reclamation Service the district forester will secure the certificate before issuing the permit.

The supervisor will cause such field examination to be made as may be necessary and will submit a special-use report (Form 964), accompanied when necessary by a report on timber to be cut or destroyed (Form 578*b*), to the district forester.

A field examination by the district engineer will be made only when necessary in the judgment of the supervisor or the district forester.

When the application is approved the district forester will prepare a permit on Form 832, in which will be inserted: Such items of Regulation L-14 as are suited to the conditions of the case.

The district forester will prepare an original and four copies of the permit. He will send the original to the permittee, one copy to the supervisor, one to the Forester, one to the chief engineer, and will retain one for his own files. The district forester will also send the Forester and the chief engineer a print copy of the map of location.

Whenever applications involve both National Forest and Interior Department lands, the district forester will handle the application in a manner similar to that prescribed for preliminary permit when involving both National Forest and Interior Department lands. (See p. 53.)

#### Transmission Line Applications and Permits, Act of February 15, 1901 (31 Stat., 790).

All permits for transmission lines, except such as are a part of a general power project covered by a power permit, or are brought under such permit by an amendment thereof and for which application is made under the act of February 15, 1901 (31 Stat., 790), will be issued by the Forester.

When a transmission line is to be used in connection with a power project already under permit and the application therefor is filed subsequently to the issuance of the general power permit, a separate permit will not be issued for the transmission line, but its construction will be authorized by an amendment of the general power permit, after the execution by the applicant of an amendment to the original stipulation. Such amendatory permits, as well as permits for transmission lines for temporary construction purposes, and permits to municipalities for municipal purposes will be issued without charge. In all other cases, unless otherwise ordered by the Secretary, a charge will be made of \$5 per annum for each mile or fraction thereof of National Forest land crossed by such lines.

Applications for such transmission line permits will be filed with the district forester and will, in addition to the papers required under Regulation L-9, consist of tracings and field notes of survey, both in the form and with affidavits and certificates required for such lines when a part of a final power application. (See Reg. L-11.)

On the receipt of applications for transmission line permits, the district engineer will examine them in the order of their receipt as certified by the district forester, with a view of determining whether the applications are complete as required by the regulations. If complete, the district engineer will certify



to the fact in the space provided on the form (Form 58a). If incomplete or insufficient, the district engineer will prepare for the signature of the district forester a letter to the applicant returning the application, or so much of it as is incorrect or incomplete, with a detailed statement of incompleteness or insufficiency. A carbon copy of this letter, certified by the initial of the district engineer, will be attached to and filed with the papers in the case.

Upon the return of the amended papers the date and hour of their receipt will be certified by the district forester in the same manner as when they were originally received.

No application for a preliminary permit for a power transmission line, except in connection with a general power project to be covered by a power permit, will be accepted, but only an application for a final permit as prescribed in the regulations. (See Reg. L-11.)

Upon the completion of the application the district forester will forward to the supervisor a copy of the application, together with two prints of the maps. Upon the receipt of the maps and other papers the supervisor will forward a print of the maps to the ranger, will cause an immediate examination to be made for the purpose of estimating the amount of timber to be cut or destroyed, and will report to the district forester on Forms 964 and 578b. If the report on Form 578b can not be made immediately, the report on Form 964 should be submitted at once, in order that the issuance of the permit may not be delayed by the inability of the supervisor or the ranger to make an immediate examination and report upon the amount of timber to be cut or destroyed.

Upon receiving the supervisor's report the district forester will prepare five copies of the permit on Form 63. The file copy will be initiated by the district engineer and the district forester. The district forester will then send the applicant a statement on Form 861 of the amount of the first year's rental charge, and will by letter inform him that any priority established under his application will be lost if the rental charges are not paid within 90 days from the date of the letter accompanying the statement, unless such time is extended by the written authority of the Secretary of Agriculture.

Upon the receipt of notification from the district fiscal agent that the payment has been made the district forester will send the original of the Form 861 to the applicant and will send to the chief engineer two copies of the complete application, two prints of the map of location, three copies of the permit, including the original and file copy and the correspondence file.

The chief engineer, if he approves the application and the form of permit, will initial the file copy, and after retaining one copy of the application and one print of the maps of location for his files will forward the remaining papers to the Forester.

Upon the receipt of the papers the Forester will, if he approves the application and the form of permit, sign the original. The original and file copy of the permit and all the other papers, except a print of the maps of location, will then be returned to the district forester.

Upon the receipt of the papers from the Forester the district for-



144     ester will forward to the permittee the original permit, will inform the chief engineer by letter of the fact and date of the signature of the permit, and will send one copy of the permit to the supervisor, together with a copy of the Form 861.

If the application involves both National Forest and Interior Department lands, the case will be handled in a manner similar to that outlined for preliminary applications. (See p. 53.)

Telephone, Telegraph, and Power-transmission Lines, Act of March 4, 1911 (36 Stat., 1253).

Applications for telephone, telegraph, and power-transmission lines, under the act of March 4, 1911, will be filed with the district forester and will conform to the requirements of applications for power-transmission lines under the act of February 15, 1901, as set forth in Reg. L-9 and Reg. L-11, except that two original tracings will be required.

On the receipt of applications for right of way grants the district engineer will examine them in the order of their receipt as certified by the district forester, with a view of determining whether the applications are complete as required by the regulations. If complete, the district engineer will certify to the fact in the space provided on the form (Form 58a). If incomplete or insufficient, the district engineer will prepare for the signature of the district forester a letter to the applicant returning the application, or so much of it as is incorrect or incomplete, with a detailed statement of the incompleteness or insufficiency. A carbon copy of this letter, certified by the initial of the district engineer, will be attached to and filed with the papers in the case. Upon the return of the amended papers the date and hour of their receipt will be certified by the district forester in the same manner as when they were originally received.

Upon the completion of the application the district forester will forward to the supervisor a copy of the application, together with two prints of the maps. Upon the receipt of the maps and other papers the supervisor will forward a print of the maps to the ranger.

Upon receiving the supervisor's report the district forester will prepare five copies of the stipulation on Form 69. The file copy will be initialed by the district engineer and the district forester. If the application is for a power-transmission line, the district forester will send to the applicant with the stipulation a statement on Form 861 of the amount of the first year's rental charge, and will by letter inform him that any priority established under his application will be lost if the stipulation is not executed and returned and the rental charges paid within 90 days from the date of the letter accompanying the statement, unless such time is extended by the written authority of the Secretary of Agriculture.

If the application is for telephone or telegraph line, the district forester will, in preparing the stipulation, add such special conditions as may be necessary in order to secure such facilities for forest officers or such use of the lines and poles of the applicant as may be necessary or convenient in the conduct of National Forest business or as may aid in the protection of the National Forests. In the letter

transmitting the stipulations for the signature of the applicant the district forester shall inform him that any priority established under his application will be lost if the stipulation is not executed and returned within 90 days from the date of the letter. No charge will be made for rights of way for telephone or telegraph lines.

Upon the receipt of the executed stipulation, and if the application is for a power transmission line, the receipt of notification from the district fiscal agent that payment has been made, the district forester will send the original of Form 861 to the applicant and will send to the chief engineer two copies of the complete application, both original tracings, two prints of the tracings, and three copies of the stipulation (including the file copy), and the correspondence file.

The chief engineer, if he approves the application and form of stipulation, will initial the file copy, and after retaining one copy of the application, one copy of the stipulation, and one print of the map of location for his files, will forward the remaining papers to the Forester.

Upon the receipt of the papers the Forester will, if he approves the application and the form of stipulation, forward the same to the Secretary for his signature. The indorsement by the Secretary upon the original tracings will constitute the grant of the right of way applied for.

Upon the return of the papers from the Forester, the district forester will forward to the grantee one original tracing and will retain the other for his own files. He will also inform the chief engineer by letter of the date and the signature constituting the approval of the Secretary.

If the application involves both National Forest and Interior Department lands, the case will be handled in a manner similar to that outlined for preliminary applications for power transmission lines under the act of February 15, 1901. (See p. 53.)

#### Copies of Maps for General Land Office.

After the issuance of any permit for the occupancy and use for power purposes of National Forest lands only, and after the approval of any grant for rights of way across such lands under the act of March 4, 1911, the district forester will send to the Forester one print copy of the general map of location for the Commissioner of the General Land Office. The map will be accompanied by a letter prepared for the signature of the Forester. The letter will state the date on which the permit was issued or the grant approved, the duration of the permit or the grant, the character of the use, the name and address of the applicant, and the date of priority. The commissioner makes entry of such permits and grants on the tract books of the Land Office. After such entry the final disposal of the tract traversed by the right of way will not be considered a revocation of the permit or of the grant, but such final disposal will be subject to such permit or grant, unless or until the permit or the grant shall have been specifically revoked, as provided for in the act of February 15, 1901

(31 Stat., 790), or in the act of March 4, 1911 (36 Stat., 1253), respectively. (See letter of the Secretary to the Commissioner of the General Land Office, Aug. 23, 1912, 41 L. D.)

146      *Motion to Strike Amended Answer and for a Decree.*

That afterwards and on the 15th day of February, 1915, the plaintiff filed its Motion to Strike Amended Answer and for a Decree herein, which being entitled in said Court and Cause, is in words and figures following, to-wit:

Comes now the above named plaintiff and moves the Court to strike defendant's answer herein and for a decree against the defendant, the Beaver River Power Company, and shows to the Court the following grounds therefor:

I.

That the answer of the defendant filed herein does not state facts sufficient to constitute a defense.

II.

That the said answer and each separate defense stated therein are insufficient in law to constitute any defense against the cause of action set forth in plaintiff's bill of complaint.

WILLIAM W. RAY,  
*United States Attorney.*

D. S. COOK,  
*Assistant United States Attorney.*

J. F. LAWSON,  
*Of Counsel.*

Service of the foregoing motion is acknowledged this 15th day of February, S. D. 1915.

FRANK J. GUSTIN,  
C. A. GILLETTE &  
DEAN F. BRAYTON,  
*Attorneys for Defendant.*

Filed February 15, 1915. Jefrold R. Letcher, Clerk.

And afterwards and on the 4th day of March, 1915, a Decree was duly made and filed in said cause, which, being entitled in said court and cause, is in words and figures following, to-wit:

This cause came on to be heard at this term upon the bill filed by plaintiff, the answer filed by the defendant, The Beaver River Power Company, a corporation, and plaintiff's motion to strike de-

fendant's answer, and for a decree. The same was argued by counsel and said motion being sustained, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That the defendant, The Beaver River Power Company, a corporation, its officers, agents, servants, employees, successors and assigns are hereby enjoined and restrained from maintaining and operating its power house, reservoir, pipe lines or conduits, telephone lines, transmission lines, dwelling houses, blacksmith's shop, workshop, stable and wagon shed, and other out building now located upon the following described lands, the property of the United States, to-wit:

The west half ( $\frac{1}{2}$ ) of Section seventeen (17); and the southeast quarter ( $\frac{1}{4}$ ) of Section eighteen (18); and the east half ( $\frac{1}{2}$ ) and Lots fourteen (14), fifteen (15) and sixteen (16), Section nineteen (19); and Lots five (5), six (6), nine (9), eleven (11), twelve (12) and sixteen (16), and the east half ( $\frac{1}{2}$ ) of Section thirty (30); and the northeast quarter ( $\frac{1}{4}$ ) of Section thirty-one (31); and the northwest quarter ( $\frac{1}{4}$ ) of Section thirty-two (32); and the southwest quarter ( $\frac{1}{4}$ ) of Section twenty-nine (29), all in Township twenty-nine (29) south, Range five (5) west; also the south half ( $\frac{1}{2}$ ) of Section twenty-four (24); the southeast quarter ( $\frac{1}{4}$ ) of Section twenty-three (23), the north half ( $\frac{1}{2}$ ) of Section twenty-six (26); the north half ( $\frac{1}{2}$ ) of Section twenty-seven (27), and the southwest quarter ( $\frac{1}{4}$ ) of Section twenty-seven (27), Township twenty-nine (29) South, Range six (6) West, Salt Lake Base and Meridian; and the west half ( $\frac{1}{2}$ ) of Section two (2), 148 and the east half ( $\frac{1}{2}$ ) of Section three (3), Township thirty (30) South, Range five (5) West, Salt Lake Base and Meridian; all as more particularly set forth and described in plaintiff's complaint on file in this Court, and the Exhibit thereto attached.

That the plaintiff be and is hereby decreed and adjudged to be the true and lawful owner of the said lands hereinabove described, and every part and parcel thereof, and its title thereto is adjudged and decreed to be quieted and confirmed as against all claims, demands and contentions whatsoever of the defendant.

That the defendant, The Beaver River Power Company, a corporation, pay to the complainant its costs incurred herein, taxed at \$20.25 and that complainant have execution therefor.

That the injunction herein ordered shall take effect from and after ninety (90) days from the date of entry of this Decree.

Dated this 4th day of March, A. D. 1915.

J. A. MARSHALL, Judge.

Filed March 4, 1915. Jerrold R. Letcher, Clerk.

#### 149 *Exceptions to Refusal of Court to Decree an Accounting.*

And afterwards and on the 5th day of April, 1915, the plaintiff and cross appellant herein entered its Exceptions to the refusal of the Court to decree an accounting, which being entitled in said court and cause, is in words and figures following, to-wit:

At this day comes W. W. Ray, United States District Attorney, and on his motion, it is Ordered that the exceptions of the complainant to the refusal of the Court to decree an accounting and damages as prayed for in the bill of complaint be entered.

J. A. MARSHALL, Judge.

150

*Petition for Appeal and Order Allowing Same.*

And afterwards and on the 30th day of April, 1915, the defendant herein filed its Petition for Appeal, which, being entitled in said court and cause, is in words and figures following, to-wit:

The above named defendant, The Beaver River Power Company, a corporation, conceiving itself aggrieved by the decree made and entered on the 4th day of March, A. D. 1915 in the above entitled proceeding, doth hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

FRANK J. GUSTON,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,

*Attorneys for Defendant and Appellant.*

FRANK H. SHORT,  
CLYDE C. DAWSON,  
S. A. BAILEY,  
H. R. WALDO,  
*Of Counsel.*

Salt Lake City, Utah, — —, 1915.

And now, to-wit, on April 30, 1915, it is ordered that the foregoing claim for Appeal be allowed as prayed.

J. A. MARSHALL,  
*District Judge.*

Filed April 30, 1915. Jerrold R. Letcher, Clerk.

151

*Assignment of Errors.*

And afterwards and on the 30th day of April, 1915, the defendant herein filed its Assignment of Errors, which being entitled in said court and cause is in words and figures following, to-wit:

Now on this 30th day of April, A. D. 1915, comes the above named defendant, The Beaver River Power Company, and says that the decree made and entered herein, on the 4th day of March, 1915, granting the injunction prayed for in the plaintiff's bill of complaint, is erroneous and against the just rights of said defendant for the following reasons:

The court erred in sustaining plaintiff's motion to strike the amended answer of defendant and in granting an injunction herein and in rendering the decree herein;

1. Because, in sustaining said motion and granting the injunction and in entering said decree herein, the court held that the defendant and its predecessors in interest did not have and had not acquired by virtue of the facts admitted by the record herein vested and accrued rights to the use of the waters of Puffer Lake and the South Fork of the Beaver River, and the incidental and necessary rights of way over the land of the plaintiff within the State of Utah, under the laws of the State of Utah and of the United States, including the right to change the place of use and the purpose for which said water might be used.

152 2. Because, in sustaining said motion and granting said injunction and in entering said decree, the court held that the defendant and its predecessors in interest did not have and had not acquired vested and accrued rights in and to the waters of the Beaver River within the State of Utah, with the right to appropriate and use the incidental and indispensable easements over the lands of plaintiff upon the giving of notice of their intention to appropriate said waters, and by commencing work designed to effect such appropriation, as set forth in defendant's answer.

3. Because, in sustaining said motion and granting said injunction, and in entering said decree herein, the court held that the withdrawal of said lands from sale and entry deprive defendant of its right to complete said work, and that the continuance and completion of said work and the operation of said hydro-electric plant, although begun and carried on in good faith and in compliance with the laws of the State of Utah, constitutes a trespass and a purpresture upon the lands of the plaintiff described in its bill of complaint.

4. Because, in sustaining said motion and granting the said injunction and in entering said decree, the court held that the laws of the State of Utah governing the appropriation and beneficial use of water, set forth in defendant's answer, are, with relation to the lands of the United States, in effect null and void for the assumed reason that they are in conflict with the Constitution of the United States, and particularly with Clause 2, Section 3, of Article IV thereof, whereas no such conflict exists.

5. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that under said clause of the Constitution of the United States, the plaintiff has governmental powers over the appropriation and use of  
153 water and the electric power generated therewith and the business conducted in connection with the same within the State of Utah which it does not have in other States of the Union in which there are no public lands, the effect of such holding being to deprive such State of Utah of her police power over the waters within her borders, and industries and business conducted wholly within the said state and such holding is in violation of the Constitution of the United States and the Tenth Amendment thereof,



and it deprives said State of Utah of her constitutional equality with the original States of the Union.

6. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that the Acts of Congress of May 14th, 1896 (29 Stat. 120) and February 15th, 1901 (31 Stat. 790) repealed or superseded Section 2339 of the Revised Statutes of the United States, with respect to rights of way over public land for the use of water for the purpose of generating and transmitting electric power, whereas such construction of said Acts is not in accordance with the intention of Congress in passing the same and the said Section was not by said Acts or either thereof repealed or superseded, and such construction is contrary to the Constitution of the United States in that it deprives the State of Utah of its police powers over the appropriation and beneficial use of water, in violation of the provisions of said Constitution of the United States and of the Tenth Amendment thereof, and in that it deprives the defendant of vested and accrued rights to the use of said waters, as well as the incidental and necessary easements over the public lands, without due process of law in violation of the Fifth

154 Amendment of the Constitution of the United States of America, and in that it arrogates to the United States of America governmental powers over the appropriation and beneficial use of waters and of a business and industry conducted wholly within the State of Utah, and control and regulation of enterprises and industries therein which are dependent upon the beneficial use of water, and which require easements traversing public lands, which powers are not granted by but which are asserted contrary to the provisions of the Constitution of the United States.

7. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that the defendant and its predecessors in interest had no right under the facts admitted by the record in this cause to appropriate necessary easements over the public land in connection with the appropriation and beneficial use of water within the State of Utah, and in compliance with its laws without first obtaining the express permission of the Secretary of the Interior if such land was not reserved, or of the Secretary of Agriculture if such land was included in a forest reserve.

8. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that the United States of America, the plaintiff herein, was entitled to an injunction restraining, preventing and destroying a public use within the State of Utah, which is authorized by the eminent domain statutes of such state, whereas any other proprietor of land would be limited in such case to an action for damages.

9. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that the plaintiff was not estopped by its conduct, under the facts admitted by the record in this case, to deny that the defendant had a vested  
155 right in the easements over said land described in plaintiff's bill of complaint, for the operation and maintenance of said hydro-electric plant of defendant.

10. Because no grounds for equitable relief are stated in plaintiff's bill of complaint, and the motion of defendant to strike said bill of complaint should have been sustained and said bill of complaint should have been dismissed for want of equity.

11. Because the court erred in sustaining said motion and in granting said injunction and in entering said decree for the reason that the regulations of the Department of the Interior and of the Department of Agriculture respecting rights of way over public lands within the State of Utah for the use of water for the purpose of generating and transmitting electric energy, compliance with which regulations by the defendant it is one of the purposes of this action to enforce, are unauthorized by any legislation of Congress, are unreasonable, are contrary to and in violation of the laws of Congress, and are unconstitutional, null and void, for the further reason that said regulations assume for the United States governmental powers which are not granted to it by the Constitution, over the appropriation and use of waters for any purpose or in any connection except in connection with navigation; for the further reason that they deprive the State of Utah of its police powers of control over the appropriation and beneficial use of water within said State, in violation of the Constitution of the United States and the Tenth Amendment thereof; for the further reason that said regulations deprive the defendant of vested and accrued rights to the use of water without due process of law in violation of the Fifth Amendment of the Constitution of the United States, and for the reason that they impose a tax and excise upon the business and  
156 operations of the defendant, which tax or excise is not uniform throughout the United States, is not authorized by Congress and is in violation of Clause 1, Section 8, Article 1 of the Constitution of the United States.

12. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that notwithstanding it was alleged and admitted that the said waters had been appropriated and the right thereto had vested and accrued under the laws of the State of Utah, and the rights of way over the public lands described in the complaint had been used and appropriated and were indispensable in connection therewith, and that electric power was being generated, sold and distributed within the State for public uses and purposes which were indispensably necessary to the industries of said State and to the inhabitants thereof, and which said State could compel to be continued for the benefit of the inhabitants of said state, that, nevertheless, the plaintiff had the right and power to eject the defendants from said rights of way and the use thereof and prevent the appropriation of such water, and take away and destroy the right thereto and to prevent and prohibit the carrying on of the said public-service industry within said State and to deprive the citizens and inhabitants of said state thereof, although they are entitled to such services and to be protected in the same by said State of Utah and under its laws.

13. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that by the

creation and establishment of such forest reserves within the said state pursuant to executive order by the President of the United

157 States, the said State of Utah and its inhabitants had been deprived of all right under the laws of the United States in connection with the appropriation and beneficial use of water within such forest reserves and the rights of way necessary and incident thereto, although, by the laws of Congress, it is expressly provided and intended that the said forest reserves may be entered upon for all lawful purposes, including the purpose and the right to appropriate and make beneficial use of the waters therein for all lawful and beneficial purposes under and in accordance with the laws of said State of Utah.

14. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court erred for the reason that no injury or damage accrued or could accrue to the United States of America by reason of the acts complained of, and because its right, if any, on account of any such injury or damage is waived by the Ninth Section of the Act of Congress of July 26th, 1866, Section 2339 Revised Statutes of the United States, and because prior to and under Sections 2339 and 2340 of the United States, it has always been the practice of the United States of America to dispose of its lands subject to vested and accrued rights to the use of water and easements connected therewith, without making any deduction in the price or acreage of such lands on account of the existence of the right to use such water and easements.

15. Because the court erred in sustaining said motion and in granting said injunction and in entering said decree, for the reason that the amended answer of the defendant and appellant herein, and each separate defense therein stated, constitutes in law and in equity a defense and defenses to the bill of complaint herein.

158 16. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court erred for the reason that by Sections 2339 and 2340 of the Revised Statutes of the United States the existence and validity of local customs, laws and decisions of the court governing the appropriations of water are recognized and confirmed, and said Section 2339 declares that the possessors and owners of such vested rights to the use of water and the rights of way therefor for mining, agricultural, manufacturing and other purposes shall be maintained and protected in the same, and that said Section 2339 has not been repealed or modified by any subsequent legislation of Congress, and said Section is in effect a recognition by Congress of the right of the States to control the appropriation and use of water for all purposes except navigation, and that the title of the United States to its public lands is held in subordination to such right.

17. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court erred for the reason that said bill of complaint should have been dismissed for want of jurisdiction, because the State of Utah is a necessary and indispensable party to said action.

Wherefore, the said defendant, the appellant herein, prays that the

decree heretofore entered in this cause be reversed, and that the said District Court of the United States for the District of Utah, Central Division, may be directed to enter a decree dissolving and vacating the injunction granted by it under said decree.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,

*Attorneys for Defendant and Appellant.*

FRANK H. SHORT,  
CLYDE C. DAWSON,  
S. A. BAILEY,  
H. R. WALDO,  
*Of Counsel.*

Filed April 30, 1915. Jerrold R. Fletcher, Clerk.

159 *Motion and Notice to Suspend and Modify Injunction.*

That afterwards and on the 30th day of April, 1915, the defendant herein filed its Motion and Notice to suspend and modify the injunction, which being entitled in said court and cause, is in words and figures following, to-wit:

Comes now the defendant and appellant above named and respectfully moves the court for an order herein suspending or modifying the injunctive portion of the decree heretofore entered and given in the above entitled cause upon such terms, as to bond or otherwise as may properly secure the rights of the said plaintiff and appellee.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,

*Attorneys for Defendant and Appellant.*

FRANK H. SHORT,  
CLYDE C. DAWSON,  
S. A. BAILEY,  
H. R. WALDO,  
*Of Counsel.*

To William W. Ray, United States Attorney:

Please take notice that on the 30th day of April 1915, defendant and appellant will move the court for an order as in the foregoing motion expressed.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,

*Attorneys for Defendant and Appellant.*

Filed April 30, 1915. Jerrold R. Letcher, Clerk.

160 *Order Granting Motion and Fixing Supersedeas Bond.*

And afterwards and on the 30th day of April, 1915, an Order granting motion to suspend and modify injunction and fixing supersedeas bond was filed, which being entitled in said court and cause, is in words and figures following, to-wit:

On this 30th day of April, 1915, came The Beaver River Power Company, a corporation, defendant and appellant in the above entitled cause and presented to the court its petition for appeal and an assignment of errors accompanying same, praying also that an order be made suspending the injunction and all further proceedings herein pending the determination of such an appeal by the Supreme Court of the United States:

In consideration whereof the Court does allow the appeal prayed for and orders that the injunction and all other proceedings be suspended upon the defendant giving bond according to law in the sum of \$5,000.00, which shall operate as a supersedeas bond.

J. A. MARSHALL, *Judge.*

Filed April 30, 1915. Jerrold R. Letcher, Clerk.

161 *Bond on Appeal.*

And afterwards and on the 30th day of April, 1915, the defendant filed its Bond on Appeal, which being entitled in said Court and Cause is in words and figures, following, to-wit:

Know all men by these presents:

That the Beaver River Power Company, a corporation, organized under the laws of the State of Colorado and having its principal office at Salt Lake City, Salt Lake County, in the State of Utah, as principal, and A. L. Woodhouse of Richfield, State of Utah, as surety, are held and firmly bound unto the United States of America in the sum of \$5,000.00, to be paid to the United States of America, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of April, 1915.

Whereas, the above named, The Beaver River Power Company, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree for an injunction granted in the District Court of the United States in and for the District of Utah in the above entitled suit on the 4th day of March, 1915.

Now therefore, the condition of the above obligation is such that, if the said The Beaver River Power Company shall prosecute its said appeal to effect, and answer all damages and costs if it fail to make

good its plea, then the above obligation to be void; else to remain  
in full force and virtue.

162 Sealed and delivered this 30th day of April 1915.

THE BEAVER RIVER POWER COMPANY,  
By A. L. WOODHOUSE, *General Manager*,  
A. L. WOODHOUSE, *Surety*.

Signed and executed in the presence of:  
FRANK J. GUSTIN.

Approved:  
J. A. MARSHALL.

Filed April 30th, 1915. Jerrold R. Letcher, Clerk.

163 *Præcipe for Transcript on Appeal.*

And afterwards and on the 30th day of April, 1915, the defend-  
ant herein filed its *Præcipe for Transcript on Appeal*, which being  
entitled in said Court and cause, is in words and figures following,  
to-wit:

164 *Præcipe for Transcript on Appeal.*

To the Clerk of the United States Court for the District of Utah:

You will please prepare and forward to the Supreme Court of the  
United States of America at Washington, D. C., a typewritten  
transcript of the record and proceedings of the above entitled cause,  
and include therein:

1. Plaintiff's Bill of Complaint.
2. Defendant's motion to strike Bill of Complaint.
3. Order on same.
4. Defendant's Amended Answer.
5. Motion to strike Amended Answer and for a Decree.
6. Order granting same and
7. Decree.
8. Petition for Appeal and Order allowing Appeal.
9. Assignment of Errors.
10. Motion and Notice to suspend and modify injunction.
11. Order granting Motion and Fixing supersedeas Bond.
12. Bond on Appeal.
13. *Præcipe for transcript on appeal.*
14. Certificate of Clerk.
15. Citation.

165

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,  
*Solicitors for Defendant and Appellant.*

FRANK H. SHORT,  
CLYDE C. DAWSON,  
S. A. BAILEY,  
H. R. WALDO,  
*Of Counsel.*



Received copy April 30th 1915.

WILLIAM W. RAY,  
*Attorney for the United States.*

Filed April 30, 1915. Jerrold R. Letcher, Clerk.

166 In the United States District Court for the District of Utah.

UNITED STATES OF AMERICA, Plaintiff and Cross Appellant,  
vs.  
THE BEAVER RIVER POWER COMPANY, a Corporation, Defendant and  
Cross Appellee.

*Cross Appeal.*

167 And afterwards and on the 5th day of June, 1915, the plaintiff and cross appellant herein, filed its Petition for Cross Appeal and Order allowing same, which being entitled in said court and cause, is in words and figures following, to-wit:

*Petition for Cross Appeal and Order Allowing Same.*

The above named plaintiff, the United States of America, conceiving itself aggrieved by the decree made and entered on the 4th day of March, A. D. 1915, in the above entitled proceeding, hereby appeals from said decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM W. RAY,  
*United States Attorney for District of Utah,  
Attorney for Plaintiff and Cross Appellant.*

J. F. LAWSON,  
*Of Counsel.*

Salt Lake City, Utah, June 5, 1915.

And now, to-wit, on the 5th day of June, 1915, it is ordered that the foregoing Claim for Appeal be allowed.

J. A. MARSHALL, *Judge.*

Filed June 5, 1915. Jerrold R. Letcher, Clerk.

168 And afterwards and on the same day the plaintiff and cross appellant herein, filed its Assignments of Error, which being entitled in said court and cause, are in words and figures following, to-wit:

*Assignments of Error.*

Comes now the above named plaintiff, the United States of America, by William W. Ray, United States Attorney for the District of Utah, and makes and files this its Assignments of Error:

1. That the Court erred in refusing to decree that defendant account and make corresponding pecuniary payment to the plaintiff for the value of the use of the lands of the plaintiff by the defendant to be measured by the duration of such enjoyment, the net power capacity of the power plant of the defendant, and the scale of charges adopted in the regulations of the Secretary of Agriculture governing similar cases during the period of said use, as set forth in plaintiff's bill of complaint herein.

2. That the trial court erred in refusing to decree that defendant pay to plaintiff the reasonable value of the use of the lands of plaintiff, as set forth and prayed for in its bill of complaint.

Wherefore Plaintiff prays that said decree be modified and amended and that said District Court be directed to enter a decree herein, in accordance with the prayer of plaintiff's bill of complaint, and as may be in conformity with the rules of equity.

WILLIAM W. RAY,  
United States Attorney, and  
J. F. LAWSON,  
Solicitors for Plaintiff.

169 Copy of above received this 4th day of June, 1915.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE &  
DEAN F. BRAYTON,  
Attorneys for Defendants.

Filed June 5, 1915. Jerrold R. Letcher, Clerk.

170 And afterwards and on the same day the plaintiff cross appellant filed its Præcipe for Transcript on Cross Appeal, which, being entitled in said court and cause, is in words and figures following, to-wit:

*Præcipe for Transcript on Cross Appeal.*

To the Clerk of the United States Court for the District of Utah:

You will please prepare and forward to the Supreme Court of the United States of America at Washington, D. C., a typewritten transcript of the record and proceedings of the above entitled cause, and include therein,

1. Plaintiff's Bill of Complaint.
2. Defendant's motion to strike Bill of Complaint.
3. Order on same.

4. Defendant's Amended Answer.
5. Motion to strike Amended Answer and for a Decree.
6. Order granting same and Decree.
7. Petition for Appeal and Order Allowing Appeal of Cross Appellant.
8. Assignments of Error of Cross Appellant.
9. Minute entry of Clerk of U. S. District Court showing exception for failure of Court to decree an accounting as prayed.
10. *Præcept* for Transcript on Appeal.
11. Certificate of Clerk.
12. Citation.

WILLIAM W. RAY,  
*United States Attorney for District of Utah,*  
*Attorney for Plaintiff and Cross-appellant.*

J. F. LAWSON,  
*Of Counsel.*

171 Received a copy of the foregoing this 5th day of June, 1915.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE &  
DEAN F. BRAYTON,  
*Attorneys for Lucien L. Nunn and*  
*the Beaver River Power Company.*

Filed June 5, 1915. Jerrold R. Letcher, Clerk.

172 UNITED STATES OF AMERICA,  
*District of Utah, ss:*

I, Jerrold R. Letcher, Clerk of the United States District Court for the District of Utah, do hereby certify that the foregoing pages numbered from one to 174 inclusive, contain a full, true and complete transcript of all the pleadings, proceedings and records now on file in said office in a certain cause heretofore adjudicated in said court wherein the United States of America was plaintiff and The Beaver River Power Company, a corporation, was defendant, as full and complete as it purports to contain and made pursuant to the præcipes filed therein by the respective parties to the appeal and cross appeal.

I further certify that the original Citations are hereto attached and herewith returned with the transcript of the record in said cause.

In testimony whereof I have affixed my official signature and the seal of said Court at Salt Lake City in said District this 19th day of June, A. F. 1915.

[Seal United States District Court, District of Utah.]

JERROLD R. LETCHER,  
*Clerk United States District Court, District of Utah.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled June 19/15. J. R. L.]

173 In the District Court of the United States in and for the  
District of Utah.

In Equity. No. 399.

UNITED STATES OF AMERICA, Plaintiff and Appellee,

vs.

THE BEAVER RIVER POWER COMPANY, a Corporation, Defendant and  
Appellant.

*Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the United States of America  
and to William W. Ray, United States district attorney, Greeting:

You are hereby cited and admonished to be and appear at the  
Supreme Court of the United States in the city of Washington, D. C.  
within sixty days from the date of this writ, pursuant to an appeal  
duly allowed and filed in the Clerk's office of the District Court of  
the United States for the District of Utah on the 30th day of April,  
1915; in a cause wherein The Beaver River Power Company, a cor-  
poration, is appellant and you are appellee, to show cause, if any  
there be, why the decree rendered against appellant as in said appeal  
mentioned, should not be corrected, and why speedy justice should  
not be done to the parties *on the* behalf.

Witness the Honorable Edward Douglass White, Chief Justice of  
the United States, this 30th day of April, in the Year of our Lord  
One Thousand Nine Hundred and Fifteen.

J. A. MARSHALL,  
*District Judge.*

Copy received this 30th day of April, 1915.

WILLIAM W. RAY,  
*U. S. Att'y.*

174 In the District Court of the United States in and for the District of Utah.

No. 399. In Equity.

UNITED STATES OF AMERICA, Plaintiff and Appellant,  
vs.  
THE BEAVER RIVER POWER COMPANY, a Corporation, Defendant and Appellee.

*Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States to The Beaver River Power Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in the City of Washington, D. C. within sixty (60) days from the date of this writ, pursuant to an appeal duly allowed, and filed in the Clerk's Office of the District Court of the United States for the District of Utah on the 5th day of June, 1915, in a case wherein the United States of America is appellant, and you are appellee, to show cause, if any there be, why the decree rendered therein should not be corrected, and why speedy justice should not be done to the appellant in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 5th day of June, in the year of our Lord one thousand nine hundred and fifteen.

J. A. MARSHALL,  
*District Judge.*

Received a copy of the foregoing this 5th day of June, 1915.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE, &  
DEAN F. BRAYTON,

*Attorneys for The Beaver River Power Co.*

Endorsed on cover: File No. 24,857. Utah D. C. U. S. Term No. 574. The Beaver River Power Company, appellant, vs. The United States. File No. 24,858. Term No. 575. The United States, appellant, vs. The Beaver River Power Company. Filed July 26th, 1915. File Nos. 24,857 and 24,858.

(24,859)

(24,860)

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1915.**

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**No. 576.**

**LUCIEN L. NUNN AND THE BEAVER RIVER POWER COM-  
PANY, APPELLANTS,**

*vs.*

**THE UNITED STATES.**

---

**No. 577.**

**THE UNITED STATES, APPELLANT,**

*vs.*

**LUCIEN L. NUNN AND THE BEAVER RIVER POWER  
COMPANY.**

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**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF UTAH.**

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1 UNITED STATES OF AMERICA,  
*District of Utah, ss:*

At a Regular Term of the United States District Court for the District of Utah, Begun and Held in the Building Used as a United States Court-house in the City of Salt Lake, in said District, on the Second Monday, Being the 12th Day of April, A. D. 1915, and of the Independence of the United States of America the 139th Year.

Present: Honorable John A. Marshall, United States District Judge for the District of Utah.

On the 14th day of February, 1914, the complainant filed its bill of complaint in said court, being in words and figures following, to-wit:

In the District Court of the United States in and for the District of Utah.

No. 421. In Equity.

UNITED STATES OF AMERICA, Plaintiff,

vs.

LUCIEN L. NUNN and THE BEAVER RIVER POWER COMPANY, a Corporation, Defendants.

2 To the Judge of the United States District Court within and for the District of Utah:

The United States of America, by the Attorney General, brings this Bill of Complaint against Lucien L. Nunn and the Beaver River Power Company, a corporation, and thereupon avers and alleges as follows, to-wit:

I.

The defendant, Lucien L. Nunn, is a citizen and resident of the State of Utah.

II.

The defendant, The Beaver River Power Company, is a corporation organized and existing under the laws of the State of Colorado, for the lucrative purposes of producing and supplying electrical energy to all who may desire to obtain it and who are able and willing to pay the defendant such pecuniary charges as it may choose to exact in return; that said defendant has its office and principal place of business in the City of Provo, in the State and District of Utah.

## III.

That for a number of years past, to-wit, since on or about the twenty-eighth day of July, A. D., 1911, said defendants have  
3 been engaged, and are now engaged, in the continuous operation of certain hydro-electric power works, situated near the town of Sevier, in Sevier and Piute Counties, State of Utah, and upon certain tracts of land hereinafter more particularly described.

The chief and essential elements composing the said works are: A Power House, Diversion Dams, Pipe Lines and Flumes, Telephone Lines, Transmission Lines, and certain buildings and other structures, all of which are herein more specifically described; that said hydro-electric power works are equipped with various water Motors, Electric Generators, and other machinery and apparatus, whereby the energy acquired by the water in its descent through said conduits or pipe lines may be transmuted into electrical energy; that said Power House, Diversion Dams, Pipe Lines and Flumes, Transmission Lines, Telephone Lines, and certain buildings and other structures belonging to the defendant company, hereinafter more particularly described, are situated wholly upon and within the land of the plaintiff, except a portion of said conduits and transmission lines as hereinafter indicated, which land, together with other lands of the plaintiff, was set apart and reserved for National Forest purposes on August 20, 1902, and which by later Proclamations issued by the President of the United States of America, dated January 24, 1906, (Appearing in Volume 34, Part 3, of the U. S. Statutes at Large, page 3189), and April 25, 1907, (Appearing in Volume 35, Part 2 of the U. S. Statutes at Large, page 2182), respectively, became a part of the Beaver National Forest, the name of which Forest, by Executive order of the President of the United States of America, dated June 18, 1908, was changed to that of the Fillmore  
4 National Forest, and said land ever since has remained and now is a part of the said Fillmore National Forest.

That the said Power House, consisting of a frame building 32 by 52 feet; a frame stable 10 by 10 feet; a frame stable 12 by 20 feet; a frame stable 12 by 16 feet; a frame dwelling 14 by 28 feet; a frame dwelling 24 by 48 feet; and other structures, all of which, except said Power House, are hereinafter referred to as "various other structures and buildings", are located in and situated upon the land of the plaintiff and within the said Fillmore National Forest, in the North-east quarter ( $\frac{1}{4}$ ) of Section twenty-eight (28), Township twenty-six (26) South, Range Five (5) West, Salt Lake Base and Meridian; that the said Diversion Dams are located in and situated upon the land of the plaintiff and within the said Fillmore National Forest, in the North West quarter ( $\frac{1}{4}$ ) of Section Sixteen (16), and in the North half ( $\frac{1}{2}$ ) of Section Five (5), in Township twenty-seven (27) South, Range Five (5) West, Salt Lake Base & Meridian; that the said Flumes and Pipe Lines are located in and situated upon land of the plaintiff and within the said Fillmore National Forest, as follows:

First. The Upper Fish Creek Flume and Conduit located in the

North West quarter ( $\frac{1}{4}$ ) of Section Sixteen (16); west half ( $\frac{1}{2}$ ) of Section Nine (9), the North East quarter ( $\frac{1}{4}$ ) of Section Eight (8); all in Township Twenty-seven (27) South, Range Five (5) West, Salt Lake Base & Meridian, having a total length of 10,814 feet; composed of 9,780 feet of wooden flume; 254 feet of 24-inch steel pipe; 200 feet of 18-inch steel pipe; 200 feet of 20-inch steel pipe; 200 feet of 18-inch steel pipe; 180 feet of 16-inch steel pipe, all of which, except 50 feet of said 16-inch steel pipe, are located upon the lands of the plaintiff.

Second. The lower Fish Creek Flume and Conduit, located in the North half ( $\frac{1}{2}$ ) of Section Five (5), Township twenty-seven (27) South, Range Five (5) West, Salt Lake Base & Meridian, and in Sections Thirty-four (34), Thirty-three (33), Twenty-seven (27) and Twenty-eight (28), Township Twenty-six (26) South, Range Five (5) West, Salt Lake Base and Meridian, having a total length of 12,830 feet and consisting of 12,110 feet of wooden flume and 720 feet of riveted steel pipe, varying in diameter from Twenty-four (24) to Eighteen (18) inches.

Third. The Picnic Creek Flume and Conduit, located in Lots Three (3) and Four (4), of Section Five (5), Township Twenty-seven (27) South, Range Five (5) West, Salt Lake Base & Meridian, having a total length of 1,960 feet and consisting of a wooden flume within which is laid a galvanized iron pipe eight (8) inches in diameter.

That said Transmission Lines are located in the North-East quarter ( $\frac{1}{4}$ ) of Section Eight (8) and in Section Five (5), Township Twenty-seven (27) South, Range Five (5) West and in Sections Twenty-Eight (28), Thirty-three (33) and Thirty-four (34), Township Twenty-six (26) South, Range Five (5) West, Salt Lake Base & Meridian, all of said Transmission line except about 500 feet being upon lands belonging to the plaintiff and within the said Fillmore National Forest, as appears more particularly by the Plat hereto attached, marked "Plaintiff's Exhibit A".

That said Telephone Lines, hereinbefore referred to, are located upon lands of the plaintiff within said Fillmore National Forest, extending from the various units of said hydro-electric power works to a connection with the offices of the said defendants upon lines substantially parallel with the said Flumes, Pipe Lines, Conduits and Transmission Lines.

The location of all said elements composing the said Hydro-electric Power Works, belonging to the Defendant, is more particularly shown by the Plat hereto attached, marked "Plaintiff's Exhibit A".

6

## IV.

Fourth. Plaintiff avers that no permission for the construction, maintenance, or use of said Power House, or other structures or buildings, or said Flumes, Pipe Lines or Conduits, Transmission Lines, Telephones or other elements composing the said Hydro-electric Power Works, hereinbefore described, was ever granted or given to the said defendants, or to either of them, and no permission or authority to occupy or use said lands, for said purposes, was

ever applied for to, or given by the Secretary of the Interior, or other officers of the United States, prior to the inclusion of said lands in the said Fillmore National Forest; and no permission or authority to occupy or use said lands for said purposes, in accordance with the Rules and Regulations promulgated by the Secretary of the Department of Agriculture governing such matters has ever been applied for, or obtained, by the said defendants, or either of them, from the Secretary of the Department of Agriculture, or from any officer of the National Forest Service, since said lands have become a part of said National Forest.

## V.

Fifth. The defendants have been accorded the fullest opportunity to comply with Acts of Congress relative to the right to occupy portions of said Fillmore National Forest, and the Rules and Regulations of the Secretary of the Department of Agriculture duly promulgated in pursuance of said Acts, and thereby to obtain from the plaintiff permission to maintain and operate the said Power House, Pipe Lines or Conduits, Transmission Lines, Reservoir, Telephone Lines, and the various other buildings and structures composing the said Hydro-electric Works, all of which are situated upon the plaintiff's land; but defendants have wilfully failed and refused to apply for or to obtain such permission under the Rules and Regulations aforesaid, and have

continued and now continue, from day to day, and month to month, to wilfully hold the exclusive possession of the lands upon which are situated the said Power House, Diversion Dams, Flumes, Pipe Lines or Conduits, Transmission Lines, Telephone Lines, and the various other buildings and structures hereinbefore described, and to operate, use and enjoy the same in open and wilful defiance of the rights of the plaintiff in the premises, and without a compliance, or a color of compliance, with the laws enacted by Congress, or the Rules and Regulations duly promulgated by the Secretary of the Department of Agriculture, in pursuance thereof, governing the enjoyment of special privileges in the use and occupation of the lands within the confines of National Forests.

That said operation produces, and has continuously produced, ever since the commencement thereof as aforesaid, powerful and copious currents of electricity which the defendants have caused, and are causing, to be conveyed through appropriate transmission lines to various towns and localities within the State of Utah. That defendants have been disposing, and are disposing of such electricity for money considerations to divers persons, firms, private corporations, municipalities who have been and are using the same for various domestic, industrial and other purposes, to which the same is adapted, including the lighting of houses and streets and the propulsion of machinery for mining and other purposes.

That plaintiff has not and cannot obtain full information as to the uses of said electrical energy otherwise than by a full discovery to be exacted of the said defendants; but avers that most of the electrical energy produced by said defendants, by means of said hydro-electric works, has been and is being delivered by the defendants in return for large pecuniary considerations. Plaintiff is not definitely in-

8       formed of the power capacity of said works, or the measure of power which has actually been developed in the operation thereof, and it cannot obtain such information otherwise than by a full discovery to be exacted of the said defendants in this cause; plaintiff avers, however, that the power capacity of said works and the not electrical horse-power already produced by the operation thereof by the defendants are very large but that no charge or compensation for, or on account of, said operation for the exclusive and beneficial possession of said reserved lands which the defendants have already enjoyed, has ever been paid by, or on behalf of the said defendants, or received by the plaintiff.

The defendants, unless restrained by this Honorable Court, will continue to operate the said works in like manner as they have so heretofore done, and therein to hold and enjoy the possession and use of the said reserved lands wherein the said described hydro-electric works are situated without compensation to the plaintiff, without its permission, and in open and wilful violation of its laws, and to the absolute exclusion of all of plaintiff's citizens who may desire to use, in whole or in part, the same lands for similar or other purposes with the plaintiff's permission, and pursuant to a full compliance with the laws and regulations touching such uses.

The plaintiff alleges and submits to the Court that the defendants' exclusive appropriation of the said lands is a purpresture and a continuing trespass, and that the persistent operation and maintenance of said works, without the permission and against the rights of the plaintiff, constitutes a public nuisance which, if not promptly put down by the injunctive power of the Court, will inevitably induce many persons to commit similar violations of the laws, and thus seriously embarrass the plaintiff in its endeavor to perpetuate its settled policies touching the use and enjoyment of National Forests and lead to a multitude of suits.

9

In consideration whereof, and forasmuch as the plaintiff is without full and adequate remedy in the premises, save in a Court of Equity, and to the end that said defendants, Lucien L. Nunn and the Beaver River Power Company, may make full, true and direct answer to all and singular the matters and things hereinbefore set out as fully as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived; and to the end that the said defendants, during the progress of this cause, and finally and perpetually may be enjoined from further operating the said works without the permission of the plaintiff, and from further obtaining, in whole or in part, its said wilful, unlawful and tortious possession and occupancy of land within the said Fillmore National Forest without the permission of the plaintiff, and without first complying with the laws of the United States and the Rules and Regulations promulgated by the Secretary of the Department of Agriculture relating to National Forests; and to the end that the reasonable value of the right of the enjoyment and maintenance of the said Power House, Diversion Dams, Flumes, Pipe Lines and Conduits, Transmission Lines, Telephone Lines, and



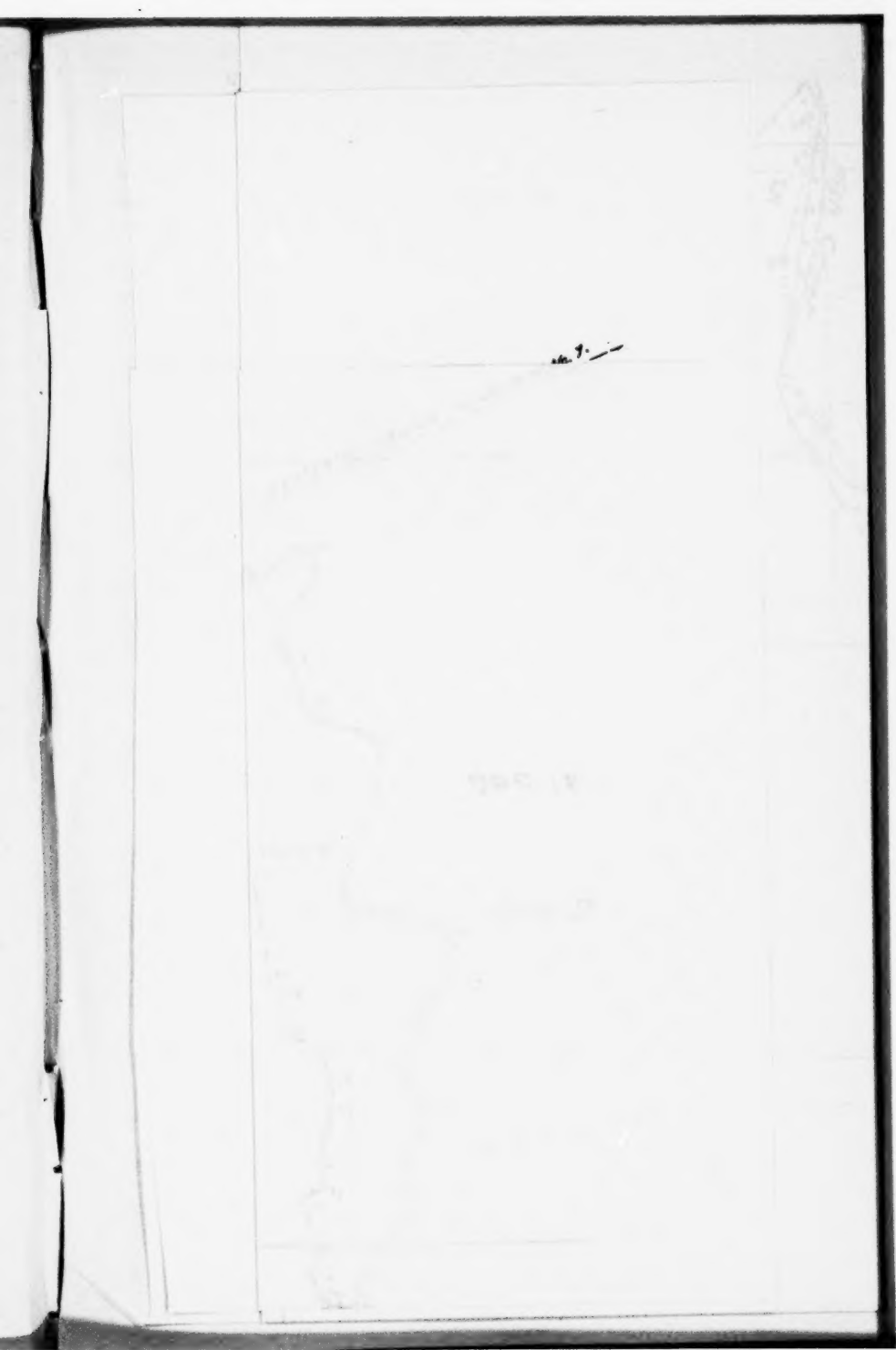
the various other buildings or structures, heretofore described, on the reserved lands aforesaid, to be gauged by the duration of such enjoyment, the net power capacity of said works, and the scale of charges adopted in the regulations of the Secretary of the Department of Agriculture governing similar cases, as the same have existed during the period of said unlawful occupancy, may be duly ascertained, and that the defendants may be compelled to account for and make corresponding pecuniary payment therefor to the plaintiff; and that the plaintiff may have such other and further relief as may seem just to this Honorable Court, and agreeable to equity and good conscience.

10     May it please Your Honor to grant unto the plaintiff a writ of Subpœna, to be directed to the said defendants, Lucien L. Nunn and the Beaver River Power Company, thereby commanding them by a certain time, and under a certain penalty therein to be limited, to appear before this Honorable Court and then and there full, true, and direct answer make to all and singular the premises, and to stand to, perform, and abide by such order, direction or decree as shall be meet and agreeable to equity.

J. C. McREYNOLDS,  
*The Attorney General of the United States;*  
WILLIAM W. RAY,  
*United States Attorney, District of Utah,*  
*Solicitors of Plaintiff.*

Filed February 14, 1914, with Exhibit (Plat). Jerrold R. Letcher, Clerk.

(Here follows map marked page 11.)





MAPS

TOO

LARGE

FOR

FILMING



12 And afterwards and on the 10th day of September, 1914, the defendant Lucien L. Nunn filed his answer herein, which being entitled in said court and cause is in words and figures following, to-wit:

*Answer of Defendant Lucien L. Nunn.*

13 To the Honorable the Judge of the District Court of the United States within and for the District of Utah:

*Answer of the Defendant Lucien L. Nunn to the Bill of Complaint.*

The defendant, reserving all manner of exceptions that may have been had to the uncertainties and imperfections of the Bill of plaintiff, comes in answer thereto, or to so much thereof as he is advised is material to be answered, and says:

**I.**

That the defendant, The Beaver River Power Company, does not claim or assert any right, title or interest in or to the properties or rights set forth and described in plaintiff's complaint. The said defendant has, therefore, disclaimed and filed its disclaimer in the above entitled action.

Denies that the defendant Lucien L. Nunn is a citizen or  
14 resident of the State of Utah, but alleges that he is and at all times in plaintiff's complaint mentioned has been a citizen, resident and inhabitant of and in the City of Telluride, in the State of Colorado.

**II.**

Admits that for a number of years past, to-wit, since on or about the 28th day of July, A. D. 1911, said defendant Lucien L. Nunn has been engaged and is now engaged in the operation of a certain hydro-electric works, situated near the town of Sevier, in Sevier and Piute Counties, State of Utah, and in particular upon certain tracts of land in plaintiff's complaint described; but denies that the defendant the Beaver River Power Company has been or is engaged in or connected with such operation.

Defendant admits the allegations of Paragraph II of plaintiff's complaint, except that the defendant denies that the hydro-electric works, equipments, transmission lines, and other properties of the defendant, are situated wholly or at all, upon or within the land of the plaintiff, except as hereinafter expressly admitted and alleged.

Defendant denies that said land alleged to belong to the plaintiff, and occupied and used by defendant, together with much other land of the plaintiff, or at all, was set apart or reserved for national forest purposes on August 20, 1902, or by later proclamations issued by the President of the United States of America, dated January 24, 1906, appearing in Volume 34, Part 3, of the United States Statutes at Large, page 3189, and on April 25, 1907, appearing in Volume



35, Part 2, of the United States Statutes at Large, page 3182, respectively became a part of the Beaver National Forest, the name of which Forest, by executive order of the President of the United States of America dated June 18, 1908, was changed to that of the Fillmore National Forest, or that said land, occupied and used by defendant, has ever since remained, or now is, a part of the Fillmore National Forest.

The defendant denies that with respect to the rights, uses and occupancies of the defendant herein the said lands have ever been withdrawn from such uses or rights, and denies each and all of the matters aforesaid, except as hereinafter admitted, alleged and explained.

Defendant admits the allegations of plaintiff's complaint with respect to the location of the power houses, and other works and structures of the defendant, as set forth and described in plaintiff's complaint, but the defendant denies that the said power houses, or other structures of the defendant, are located or situated upon the land of the plaintiff within said Fillmore National Forest, or that said pipelines or conduits are located or situated upon the lands of the plaintiff within said Fillmore National Forest as described, or at all, or that said other described works, structures, or transmission lines, or any thereof, are upon lands belonging to the plaintiff within said Fillmore National Forest, or which appears more particularly by the plat attached to plaintiff's complaint, and marked Exhibit "A," or that said described telephone lines, or any thereof, are located upon lands of the plaintiff within said Fillmore National Forest, and denies that the plaintiff is the owner of, or entitled to the possession of all or any portion of the said lands occupied, used or enjoyed by the defendant, as set forth and described in plaintiff's complaint, or otherwise, or at all, or that the plaintiff has any interest therein, or any connection therewith, as to said lands so occupied or used, except as in this answer hereinafter expressly admitted, alleged and explained.

Defendant admits with respect to the lands described in plaintiff's complaint, and alleged to belong to the plaintiff herein, except as to those portions thereof occupied or used by the defendant herein, that said lands are public lands of the United States, held and owned by the plaintiff under and pursuant to the laws of the United States and the State of Utah, and not otherwise.

Defendant further alleges that defendant is the owner of Mill Site Survey No. 4430-B, upon which Mill Site the upper power house station referred to and described in plaintiff's complaint is situated, and also alleges that the land occupied by the first 4500 feet of the upper flume described in plaintiff's complaint are covered by valid mining claims, located, occupied and possessed under and in accordance with the laws of the United States, which said claims were located in and have been maintained since the year 1902.

The defendant Lucien L. Nunn further alleges that the predecessors in interest of the defendant herein, in and during the years

1900 and 1901, entered upon the said Fish Creek and a certain tributary thereof called Picnic Creek, and at the points mentioned in plaintiff's complaint, and by the canals, ditches, flumes or aqueducts therein mentioned, diverted and appropriated from the said Fish Creek and its tributaries the waters therein flowing, to the extent of the capacity of said canals, flumes, ditches and aqueducts, and that said waters and all thereof were diverted and appropriated under and in accordance with the laws of the State of Utah, and the same were appropriated and diverted and applied to beneficial uses, to-wit, to the development and operation of mines and mining property, and for that purpose and in that connection for the generation, conveyance and use of electric power and the operation of said mines, and that said electric power so generated was also transmitted, conveyed and used for the purpose of supplying the

17 inhabitants of the town of Kimberly (which said town or settlement had grown up around and in connection with the mining properties for which said water had been appropriated) with lighting, heating and other beneficial uses in connection therewith.

That said water was so appropriated under and in accordance with certain written notices of appropriation, duly posted and recorded, as required by the laws of the State of Utah, and after which posting of said notices of appropriation the predecessors in interest of the said defendant proceeded with all reasonable diligence to construct the necessary canals, ditches, works and other structures necessary for the appropriation and beneficial use of said water, and the said water and all thereof was appropriated and applied to the beneficial uses aforesaid during the years 1900, 1901 and 1902, and from and ever since the time of posting of said notices and entering upon the work of appropriating the said water, and ever since the appropriation and beneficial use of the same, the defendant herein and his predecessors in interest have been and now is vested with the right to appropriate, convey and use said waters and all thereof, under and in accordance with the laws of the State of Utah, and under and in accordance with the decisions of the courts of said state.

That at the time and in connection with the appropriation and beneficial use of said water, the predecessors in interest of the defendant herein proceeded with the construction of all necessary canals, ditches, flumes, aqueducts, pipelines, and other structures, dams, works and power houses, transmission lines, telephone lines and roads for the necessary and convenient appropriation and beneficial use of said water, and during the said years, 1900, 1901 and 1902, the said rights of way and all thereof were used and occupied, and the said canals, ditches, flumes, aqueducts, pipelines,

transmission lines, power houses, telephone lines and other  
18 works and structures referred to and described in plaintiff's complaint, and necessary in connection with the appropriation and beneficial use of said water, were occupied and used and ever since have been so occupied and used, and are necessary and indispensable in connection with the appropriation and beneficial use of said water.

That in so doing, said predecessors in interest of the defendant herein and the defendant so did with the full knowledge and acquiescence of the plaintiff herein, its officers and agents, and so did openly and notoriously and under a claim of right and in accordance with the laws of the Congress of the United States authorizing and permitting said uses, and the right to the appropriation and beneficial use of said waters, as now appropriated and used, and to the said rights of way and other area so occupied and used, are necessary and indispensable in connection with the appropriation and beneficial use of said water, and have been and for more than ten years next prior to the commencement of this action, were vested and accrued under and in accordance with the laws of the State of Utah, and of the United States of America.

### III.

Defendant denies that no permission for the construction, maintenance, or use of the said power house, or other structures or buildings, or said pipelines, or conduit, transmission lines, or other elements composing the said hydro-electric power works described in plaintiff's complaint, was ever granted to said defendant, or that no permission or authority to occupy or use said lands for said purposes was ever applied for, to, or given by the Secretary of the Interior, or other officers of the United States, prior to  
19 the inclusion of said lands in said Fillmore National Forest, except as hereinafter expressly admitted, alleged and explained.

Defendant denies that no permission or authority to occupy or use said lands for said purposes, in accordance with the rules or regulations promulgated by the Secretary of the Department of Agriculture, governing such matters, has ever been applied for or obtained by said defendant from the Secretary of the Department of Agriculture, or from any officer of the National Forest Service, since said lands have become a part of the said Fillmore National Forest, except as hereinafter expressly admitted, alleged or explained.

### IV.

The defendant denies that the defendant has been accorded the fullest, or other opportunity, to comply with the acts of Congress, or any part thereof, relative to the right to occupy portions of said Fillmore National Forest, or the rules or regulations of the Secretary of the Department of Agriculture, duly, or otherwise, promulgated in pursuance of said acts, or thereby or at all, to obtain from the plaintiff permission to maintain or operate the said power house, pipelines, or conduit transmission lines, reservoir, telephone lines, or the various, or any other buildings or structures composing the said hydro-electric works; and denies that all or any of the same are situated upon the plaintiff's lands, except as hereinafter expressly admitted, alleged or explained.

Defendant denies that the defendant has wilfully, or otherwise,

failed or refused to apply for or to obtain such permission under the rules and regulations aforesaid, or has continued, or now continues from day to day and month to month to wilfully or unlawfully hold the exclusive, or other possession of the lands upon which are situated the said power house, reservoir, pipelines, or conduit, transmission lines, telephone lines, or the various other buildings or structures in plaintiff's complaint described, or to operate, use or enjoy the same in open or wilful defiance of the rights of the plaintiff in the premises, or without compliance, or color or compliance, with the laws enacted by Congress, or the rules or regulations duly or otherwise promulgated by the Secretary of the Department of Agriculture in pursuance thereof, to govern the enjoyment of special privileges in the use and occupation of lands within the confines of the National Forest; and the defendant denies that it has entered upon, occupied or used said lands, or any portion thereof, without compliance with all or any of the laws of Congress, or contrary thereto, or in violation thereof in any respect whatsoever, or without compliance with or in violation of any of the lawful, proper or authorized rules or regulations of the said Departments of the Interior or Agriculture, or either thereof, or in any respect contrary to any of said rules, regulations or requirements, except as in this answer particularly alleged or explained.

And defendant denies that he receives in return for said electricity supplied large pecuniary considerations, but upon the contrary, alleges that the said operations are conducted in a remote and sparsely settled district of country, and that no sufficient electric power can be marketed therefrom to realize a profit, and that practically no income is received therefrom in excess of the expense of operating the same, and that the same have been and are constructed, operated and maintained largely in the hope of developing the country and in time acquiring remunerative markets for the electricity so produced.

## V.

Defendant admits that it is his intention to continue to operate said hydro-electric works, and unless restrained by this Court, will continue further so to do, but affirms and alleges that under the law he has the right and authority to so maintain and operate said hydro-electric works, and denies that the same is unlawful, or in open or wilful, or any other violation of plaintiff's laws, or to the absolute exclusion or any exclusion of any other citizen of the plaintiff.

Defendant denies that defendant's exclusive, or other appropriation of the said lands, is a purpresture, or a continuing or other trespass, and denies that the same is without permission, or against the right of the plaintiff, and denies that the persistent or other operation of said works, as in plaintiff's complaint set forth, constitutes a public or any nuisance, which, if not promptly or otherwise put down by the injunctive power of the Court, will in-

evitably or otherwise, induce many persons, or any person, to commit similar or any violations of the laws, or thus seriously or otherwise embarrass the plaintiff in his endeavor to perpetuate his settled policies touching the use or enjoyment of national forests, or lead to a multitude of, or to any suits, and denies that the plaintiff has any settled policies, or any policies, touching the use or enjoyment of national forests except as set forth in the acts of Congress with respect thereto.

Further answering the allegations of said paragraphs II to V inclusive of plaintiff's complaint, the defendant admits, alleges and explains as follows:

Defendant admits that he is the owner of, and in the possession of, and operating and using the hydro-electric works, power houses, pipelines, conduits, transmission lines, reservoirs, telephone lines, and buildings and other structures, described and set forth in plaintiff's complaint, and herein referred to, and alleges that he

22 is the owner of, and is appropriating and using the water and water rights referred to in plaintiff's complaint, and herein described, and that all thereof, including said lands so occupied and used, are necessary and indispensable in connection with the appropriation and beneficial use of said water, and the operation of said hydro-electric works, and the development and distribution of power therefrom.

The defendant further alleges that it holds a perpetual right over and upon the lands described in plaintiff's complaint, for the appropriation and beneficial use of the said water, and for the occupancy and use of the said power house, pipelines, conduits, transmission lines, reservoirs, telephone lines, and buildings and structures, and the appurtenances used in connection therewith, and that the acquisition and nature of said rights are hereinafter in this answer more particularly set forth. And the defendant alleges that the right, title and interest of the plaintiff and its right to the possession and use of the lands described in plaintiff's complaint, is wholly subject to and subordinate to the rights, uses and enjoyments of the defendant herewith with respect to all and every part of the land so occupied and used in connection with the appropriation and beneficial use of said water, and the production, distribution, and use of the electricity generated thereby and sold and distributed therefrom.

The defendant admits that on August 20, 1902, an executive order of the President of the United States was promulgated and issued, reserving, or purporting to reserve, from entry or settlement, for national forest purposes, Townships 29 and 30 South Range 5 West, and Township 29 South Range 6 West, Salt Lake Base and Meridian, but defendant alleges that by said orders the said reserve was merely a temporary withdrawal, and did not purport or claim to be a permanent reservation for national forest purposes. And

23 the defendant alleges that thereafter a proclamation was issued by the President of the United States, dated April 18, 1904, vacating said previous order of withdrawal so far as it applied to or affected Sections three (3), four (4), five (5), six (6),



seven (7), eight (8), nine (9) and ten (10), and Sections fifteen (15) to thirty-six (36) inclusive in Township 29 South Range 6 West, Salt Lake Base and Meridian.

And defendant further alleges that by proclamation issued by the President of the United States, dated October 5, 1905, all of Townships 29 and 30 South Range 5 West, Salt Lake Base and Meridian, and Sections one (1) and two (2) and Sections eleven (11), twelve (12), thirteen (13), and fourteen (14) of Township 29 South Range 6 West, Salt Lake Base and Meridian, were vacated, and said lands restored to settlement.

And defendant alleges that from and during the period from April 18, 1904, Sections twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26) and twenty-seven (27) in Township 29 South Range 6 West, Salt Lake Base and Meridian, up to and including April 25, 1907, were open, unoccupied public domain of the United States, and not reserved lands of the United States.

And defendant alleges that from October 5, 1905, Townships 29 and 30 South Range 5 West, Salt Lake Base and Meridian, were, up to January 24, 1906, open, unoccupied and unreserved lands of the United States.

Defendant admits that on January 24, 1906, and on April 25, 1907, the President of the United States issued a proclamation, setting apart, or purporting to set apart, as public reservations for national forest purposes, large bodies of public lands of plaintiff, situate, lying and being within the limits of the State and District of Utah, and in and by which proclamation the said reservation was

named the "Beaver National Forest; and the Boundaries thereof were therein specifically described. And admits that a further executive order was promulgated by the President of the United States, dated June 18, 1908, wherein modifications were made by the President of the United States, by the change of the name thereof to that of "Fillmore National Forest."

The defendant admits the promulgation and issuance of the orders aforesaid, and as herein alleged, by the President of the United States, but alleges that the lands therein described were not, nor were any thereof, thereby or at all withdrawn from the rights, uses or occupancies referred to and described in plaintiff's complaint of the defendant herein. Upon the contrary, defendant alleges that all of the lands referred to and described in plaintiff's complaint, so used or occupied by the defendant herein, were at and during all of said times open to the use and enjoyment of the defendant herein for the appropriation and beneficial use of the waters appropriated and used, and for the beneficial use and enjoyment of the rights and privileges and occupancies of the defendant upon said public lands, and all thereof, for the appropriation and beneficial use of said waters, and the beneficial use and distribution of the products thereof, including the electric power generated thereby and in connection therewith, and used and distributed as in plaintiff's complaint and hereinafter in this answer more specifically alleged and set forth.



*Special Defense.*

Further answering said complaint, and with reference to said paragraphs II to V thereof, and with special reference to paragraph IV of said complaint, the defendant alleges:

That he has complied with all of the acts of Congress, and with all of the laws of the United States of America with respect to the entry upon, occupation and use of all of the property occupied  
25 and used by the defendant in connection with the appropriation and beneficial use of said waters, and with the development, distribution and use of said hydro-electric power, and in that regard the defendant alleges that he has complied with and offered to comply with all of the rules and regulations of the plaintiff, or of the Department of the Interior or of Agriculture, lawfully adopted under or authorized by any of the acts of Congress aforesaid, and in that respect and behalf the defendant alleges that the original appropriation, and the notice of appropriation of said water, and the work done preliminarily to the appropriation and beneficial use thereof, under and in accordance with the laws of said State, was done as to the greater portion thereof upon the public and unreserved lands of the United States, and all thereof was done upon lands which were either then or thereafter and during the course of the work essential to the said appropriation, unreserved public lands of the United States, and that there were no rules or regulations of the plaintiff, or either of said Departments, in any manner applicable to the appropriation of said water, or the procedure thereunder connected with the said beneficial use thereof, and that after the order creating said Forest Reserve was promulgated, as hereinbefore alleged, in the month of January, 1906, that the defendants herein, and *its* predecessors, proceeded, as hereinbefore alleged, with the approval, consent and acquiescence of the plaintiff, and its said officers and representatives, and thereafter, and after the completion of the appropriation of said water and the application of the same to beneficial uses, and after the generation and distribution of the electric power produced thereby, the said officers of the plaintiff herein, and particularly the Secretary of Agriculture, purported and pretended and claimed to adopt certain rules and regulations, which rules and regulations were without any authority of any act of Congress, whatsoever, were wholly unauthorized, unreasonable,  
26 contrary to and in violation of the laws of Congress, null and void, and that such illegal, unauthorized and unreasonable rules have not been complied with by the defendant herein for the reason, and solely for the reason, that the same are illegal, unauthorized, null and void, and the defendant herein submits and attaches to this answer and makes a part thereof, the rules and regulations adopted by and claimed to be in force by the Secretary of Agriculture, which said rules and regulations had been adopted, or were claimed to have been adopted, prior to the commencement of this action, and are the rules and regulations referred to in plaintiff's complaint, and which are therein alleged to have been required of

the defendant, and which it is alleged the defendant refused to accept or enter into.

And the defendant further alleges that at and prior to the commencement of this action the said rules and regulations herein elsewhere set forth, referred to, and made a part hereof, were embodied into what were styled "permit agreements," and prior to the commencement of this action, and after the completion and installation of defendant's structures and works, and the appropriation and beneficial use of the water herein referred to, and after the installation of said hydro-electric power plant, and the production, distribution and use of power therefrom, the plaintiff herein, by its said officers, demanded of the defendant that it acquiesce in said illegal, unauthorized and unreasonable rules and regulations, and enter into said permit agreement with the plaintiff herein, and on account of the refusal of the defendant so to enter into such permit agreement, and to submit to and acquiesce in said rules and regulations, the plaintiff has brought this action, and seeks the relief by the plaintiff prayed for in its complaint, and the defendant has never refused to abide by or submit to the laws of Congress, or to any rules or regulations of the plaintiff authorized thereby and adopted thereunder, but

27      has refused and does refuse to submit to the excessive, unreasonable, unlawful and unauthorized rules embodied in said permit agreement, and herein in this answer elsewhere set out and referred to, and made a part hereof.

For a further and separate answer and defense herein, the defendant alleges:

That long prior to the commencement of this action, to-wit, during the years 1900, 1901 and 1902, the defendant herein, and his predecessors in interest, under and in accordance with the laws of the State of Utah, appropriated and diverted the waters referred to and described in plaintiff's complaint and in this answer, and constructed, installed and equipped his hydro-electric plant connected therewith, and also described and referred to in plaintiff's complaint and in this answer, and that said water was appropriated, and the dams, works, reservoirs, ditches, aqueducts, pressure lines, and other necessary and appurtenant works and structures were constructed and equipped by the defendant, and his predecessors, for that purpose, and said connected hydro-electric plant for the beneficial use of said water was similarly constructed, installed and equipped, as located and described in plaintiff's complaint, during said years, with the full knowledge, and with the acquiescence, permission and approval and consent of the plaintiff herein, and upon the lands and premises described in plaintiff's complaint, and all thereof was done under and in accordance with the laws of the State of Utah, and said water was appropriated and applied to such beneficial uses, and the power produced thereby was generated for the purpose of sale, rental and distribution to the inhabitants of the said State of Utah.

That the beneficial uses to which said water and electric power have been applied by the defendant and his predecessors, are, the

operation of mines and mills for the reduction of ores, for  
28 supplying light, for the municipal uses of cities and towns,  
and for the domestic and other necessities of the inhabitants  
thereof. That said power generated by the use of said water has  
been supplied, and is now being supplied for all of the uses and pur-  
poses aforesaid, to all of the cities and towns, and the inhabitants  
thereof desiring the same, of the said State of Utah within the dis-  
trict reached and supplied by the lines and distributing system of the  
defendant herein, referred to and described, and that the right and  
duty of the defendant to appropriate and continue the appropriation  
of said water, and to apply and supply the same to the beneficial  
uses and purposes aforesaid, and for the uses of said cities and towns,  
and for the inhabitants thereof, and the inhabitants of said State,  
and for the purpose of carrying on the industries operated thereby  
has been, and for more than five years prior to the commencement  
of this action has been, accrued, fixed and vested under and in ac-  
cordance with the laws of said State, and is necessary and indis-  
pensable for the public uses aforesaid.

That said electric power is now distributed and supplied to numer-  
ous cities, towns and villages, and the inhabitants thereof, and to  
the communities, individuals, and industries occupying the territory  
covered by the distributing lines of the defendant, and is so sup-  
plied and furnished to all persons needing and desiring the same.

That the said business and industry of the defendant so carried  
on is a public service under and in accordance with the laws of the  
said State of Utah, and the said electric energy generated by the use  
of said water is sold, furnished and distributed to all persons, corpo-  
rations and municipalities needing or desiring the same within the  
territory reached by and capable of being supplied from the distrib-  
uting lines of the defendant herein, and the right and duty  
29 of the defendant to continue said service is fixed under and  
in accordance with the laws of the said State, and the defend-  
ant herein may be compelled, and is subject to be compelled by the  
laws of the said State, and by the authority of the courts thereof, to  
continue such service, and to supply said electric power, to all of the  
inhabitants and citizens of said State, and the municipalities thereof  
desiring and demanding and in a position to receive the same, and  
the defendant has no right or authority to cease the said service, or  
to cease to supply the said water, and the products thereof, and said  
electric power to the persons now receiving and enjoying the same,  
and there is no other sufficient available supply of water or power  
or energy to carry on the service, and to supply the public necessi-  
ties herein referred to and described, and if the same was prevented  
or interrupted, great and irreparable injury would be done to the  
defendant herein, and to all of the citizens and inhabitants of the  
said State, and to the municipalities thereof, by the interruption of  
said service, and the right and duty of the defendant to use and en-  
joy said property, and to use and enjoy the necessary rights over  
all of the land and property described in plaintiff's complaint, and  
to continue said public service is vested and fixed under and in ac-

cordance with the laws of the said State, and is a continuing and perpetual right, and a continuing and perpetual use and necessity.

For a further and separate answer and defense herein, the defendant alleges:

1. The Territory of Utah was created by an Act of Congress approved September 8, 1850, which provided, among other things, that the legislative power of said Territory should be vested in the

30 Governor and a legislative assembly, and should extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of said Act, but that no law should be passed interfering with the primary disposal of the soil, and further provided that all the laws passed by the legislative assembly and Governor should be submitted to the Congress of the United States, and that if disapproved they should be null and of no effect.

2. An Act of the Legislature of the Territory of Utah, approved by the Governor of said Territory February 20, 1880, contained the following:

"Sec. 6. A right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of, and reasonable necessity for such use thereof, under any of the following circumstances:

First. Whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water course, lake, or spring, or other natural source of supply.

Second. Whenever any person or persons shall have had the open, peaceable, uninterrupted and continuous use of water for a period of seven years."

"Sec. 7. A secondary right to the use of water for any of said purposes is hereby recognized and acknowledged to have vested and accrued (subject to the perfect and complete use of all primary rights) to the extent of and reasonable necessity for such use thereof, under any of the following circumstances: First—Whenever the whole of the waters of any natural stream, water-course, lake, spring, or other natural source of supply has been taken, diverted and used by prior appropriators for a part, or parts of each year only; and other persons have subsequently appropriated any part, or the whole of such water during any other part of such year, such persons shall be deemed to have acquired a secondary right. Second—Whenever, at the time of an unusual increase of water exceeding seven years' average flow of such water, at the same season of each year, all the water of such average flow then being used by prior appropriators, and other persons appropriate and use such increase of water, such persons shall be deemed to have acquired a secondary right."

"Sec. 12. Whenever the terms mentioned in this section are employed in this Act, they are employed in the sense hereinafter affixed to them, except where a different sense plainly appears; First—The

term 'person' when applicable, includes 'firm,' 'partnership,'  
31 'joint stock company,' 'association,' and 'corporation.'"

"Sec. 15. All persons shall have the right of way across and upon public, private and corporate lands, or other right of way for the construction and repair of all necessary reservoirs, dams, water-gates, canals, ditches, flumes, or other means of securing and conveying water for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other rights of way, highway, or public or private road, nor to unnecessarily injure any public or private property."

3. The said Act of the Legislature of the Territory of Utah was duly submitted to the Congress of the United States, but was not disapproved, and the said Act remained and continued to be the law of said Territory.

4. The Territory of Utah became the State of Utah, and as such was admitted into the Union on an equal footing with the original states, on January 4, 1896, pursuant to an Act of Congress called "The Enabling Act," approved July 16, 1894, and a Proclamation of the President of the United States issued January 4, 1896. The said Enabling Act provided by Section 19 that all laws in force made by said Territory at the time of its admission into the Union should be in force in said State, except as modified or changed by said Act or by the Constitution of said State. The Constitution of the State of Utah, adopted November 5, 1895, provided by Article XVII that all existing rights to the use of any of the waters of the State for any useful or beneficial purpose were thereby recognized and confirmed, and further provided, by Article XXIV, Sec. 2, that all laws of the Territory of Utah then in force, not repugnant to said Constitution, should remain in force until they expired by their

own limitations, or were altered or repealed by the Legisla-  
32 ture. The Act of the Legislature of the Territory of Utah, approved February 20, 1880, hereinabove mentioned, was not modified or changed by the Act of Congress approved July 16, 1894, and was not repugnant to the Constitution of the State of Utah, or the Constitution of the United States, and accordingly became the law of said State.

4. An Act of the Legislature of the State of Utah, approved April 5, 1896, entitled "An Act to encourage the Irrigation of Land, the Mining, Milling, Smelting and other reduction of Ores, and the use and application of the Unappropriated Waters of Natural Streams and Water-courses to the Generation of Electrical Force and Energy, and to provide for the exercise of the right of Eminent Domain therefor" contained the following:

"The cultivation and irrigation of the soil, the production and reduction of ores, are of vital necessity to the people of the State of Utah; are pursuits in which all are interested, and from which all derive benefit; and the use and application of the unappropriated waters of the natural streams and water-courses of the State to the generation of electrical force or energy to be employed in industrial



pursuits are of great public benefit and utility. So irrigation of land, the mining, milling, smelting, or other reduction of ores, and such use and application of such waters for the generation of electrical power to be employed as aforesaid are hereby declared to be for the public use, and the right of eminent domain may be exercised in behalf thereof."

An act of the Legislature of the State of Utah, approved March 11, 1897, entitled "An Act in relation to Water Rights and Irrigation, and making Provisions regulating the same," contained the following:

"Any person or corporation shall have the right of way across and upon public, private, and corporate lands, or other right of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, or other means of securing, storing and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases  
33 be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use."

6. It has always been the custom of the inhabitants of said Territory and State to appropriate and use waters of the rivers and streams therein for mining, agricultural, manufacturing and all other use purposes through the construction of reservoirs, dams, canals, ditches, flumes or other means of diverting and conveying the water from such rivers and streams to the point of beneficial use. Such appropriation and use of water has been necessary in the settlement and development of said Territory and State. Originally all of the land in said Territory and State was, and about 90% thereof still is, public land of the United States. It has always been the custom of the inhabitants of said Territory and State to construct reservoirs, canals, ditches, flumes or other means of diverting and conveying water upon such public land without applying for or obtaining any permission from any representative of the United States, or paying any compensation therefor. It has always been recognized by the local customs, laws and decisions of the courts of said Territory and State that any beneficial use of water was a public use, that any person or corporation who first appropriated the water of any river or stream and applied the same to some beneficial use, acquired a vested right to the water so appropriated. (such right being measured by the extent of the beneficial use), and to any reservoir, canal, ditch, flume or other means of diverting or conveying water, constructed and used for such purpose, and also rights of way therefor upon or over the public land of the United States, and that any person or corporation entitled to the use of water  
34 might thereafter change the point of diversion and the point and purpose of beneficial use. By Acts of Congress approved July 26, 1866, and July 9, 1870, and by Sections 2339 and  
2340 of the Revised Statutes of the United States formally recog-



nized the existence and validity of such local customs, laws and decisions of courts, and formally declared that the possessors and owners of such vested rights to water and rights of way therefor for mining, agricultural, manufacturing or other purposes, should be maintained and protected in the same. No officer or other representative of the United States has until some time in 1909 questioned any such rights to the use of water, or any such rights of way over land of the United States, or demanded or attempted to exact any compensation for any such rights of way.

Defendant further alleges that the territory now embraced within the State of Utah was acquired by the Government of the United States under and in accordance with the Treaty with the Republic of Mexico, dated February 2, 1848, under and in connection with which Treaty it was stipulated and agreed on the part of the United States with the said Republic of Mexico that the said territory should be incorporated into the Union of the United States, and be admitted at the proper time, to be judged of by the Congress of the United States, to the enjoyment of all of the rights of citizens of the United States, according to the principles of the Constitution of the United States.

That pursuant to an Act of Congress called the Enabling Act, approved July 16, 1894, and consistent with this Treaty, the Territory of Utah was admitted to the American Union as a state, on an equal footing with the original states, and with all of the other states of the Union, in all respects whatsoever.

35 That under and in accordance with the Constitution of the United States, the right, title, and possession of the Government of the United States over and in connection with the public lands, is held subject to the right of each and every one of the states to utilize and develop its resources, and to construct and operate all necessary ways and means of communication and development, and that the right to the appropriation and beneficial use of water, with the necessary rights of way over the public lands, so held by the United States, was inherent in each and all of the states, and upon its becoming a member of the American Union the State of Utah acquired and held, and now holds, the right to the appropriation and beneficial use of the waters of the said state flowing in the streams thereof, and with and including the necessary rights of way and other occupancies and uses essential to the appropriation and beneficial use of said water, and the products of the same, and that the right of sovereign control over the said lands so held by the United States is in the State of Utah, and in all of the other states of the Union, and the Government of the United States, by the acts of Congress and the decisions of the courts of the United States, has always recognized the inherent right of each of the states to the appropriation and beneficial use of its waters, and of the necessary and essential rights of way therefor, and the Congress of the United States by the various acts of Congress, and which have been embodied in the Statutes of the United States, has recognized and confirmed the right of the states, and the citizens and inhabitants thereof, and all others authorized by the laws of such

state, to appropriate and beneficially use the waters of said state, and has also recognized and confirmed the right to the necessary rights of way for the appropriation and beneficial use of said waters, and each and all of the Forest Reserves of the United States, which

36 have been created or established by executive order, have been created and established and exist under the express enactment and declaration of Congress that the waters therein shall be subject to appropriation and beneficial use, and by no act of Congress has the Government of the United States ever attempted to restrict, prevent or interfere with the appropriation and beneficial use of water within the forest or other reserves of the United States, but has expressly recognized, acknowledged and confirmed the said right, and the continuous use and enjoyment of the same, and the various Departments of the Federal Government, including the Department of the Interior and the Department of Agriculture, have never been authorized to adopt any rules or regulations preventive of, or restrictive of, or imposing any burdens or obligations upon the appropriation or beneficial use of water within any of the states of the Union, or within any forest reserve, but have been, by the said acts of Congress, prohibited from adopting any rules or regulations preventive of, or restrictive of, or limiting or imposing any charges or obligations in connection with the appropriation or beneficial use of water within any state, or within any forest reserve established or situated within any State. That under the Constitution of the United States, the United States holds and owns the public lands as a proprietor thereof, and that no municipal powers or powers of government are attendant upon or connected with the ownership or possession of the public lands, and that the powers of the Government of the United States within each and every one of the states, for all municipal or governmental purposes, are identical in each and all of the states, and are no greater and no less in those states having public lands than in those states where there are no public lands, or in which there never have been any public lands, and that the Government of the United States cannot exact of any one of the states the surrender of any of  
37 its powers upon or in connection with its admission to the Union, or upon or in connection with the possession or ownership of any of the public lands therein by the United States.

That notwithstanding the promises, and notwithstanding the prohibition contained in the Constitution of the United States against the exercise of any municipal powers within any state by the United States Government, under or in connection with the ownership or use of the public lands, and notwithstanding the inherent right of the states to the appropriation and beneficial use of its waters, and the necessary rights of way therefor over the public lands, and notwithstanding the acts of Congress aforesaid, acknowledging, confirming and approving said rights, and notwithstanding the acts of Congress acknowledging and confirming and continuing such rights within the forest reserves of the United States for the appropriation and beneficial use of the waters within such reserves

by the state, and its inhabitants, and those authorized by its laws, the Secretary of Agriculture of the United States and the Secretary of the Interior have very recently, and shortly before the commencement of this action, adopted, or pretended to adopt certain wholly unauthorized, unconstitutional and illegal rules, regulations and restrictions, not only upon and limiting the right of appropriation and beneficial use of water within the states and upon the public lands and within the forest reserves therein situated, but have undertaken, and are now undertaking to subject the right to the appropriation and beneficial use of water already appropriated, and the right to the use and enjoyment of rights of way already devoted to and used in connection with such appropriation of the waters of said state, and the development and distribution of the products thereof, to the aforesaid illegal, unauthorized and unconstitutional rules and regulations, under and in connection with which the said officers of the said Government

38 not only seek to prevent the appropriation and beneficial use of the waters within such states, and upon the public lands, and within the forest reserves, but also seek to subject existing appropriations and existing beneficial uses to the power and authority of the said United States, and of its said officers, and in addition thereto, by the said rules and regulations, are undertaking to assert, and thereby do assert, the right to exercise certain municipal and other governmental powers within the State of Utah and other states, wholly contrary to the Constitution of the United States, and wholly unauthorized and unwarranted by any act of the Congress of the United States.

A copy of said rules and regulations so referred to, and so claimed to have been adopted, and which are sought in this action to be enforced, is hereto annexed, and is marked Exhibit "A," and is made a part of this answer.

This action is brought and prosecuted for the purpose of illegally and unlawfully, and contrary to the constitutional rights of the State of Utah, and of this defendant, and of the inhabitants of the said state, subjecting this defendant, and the inhabitants of the said State of Utah, and all of the customers of the defendant enjoying said waters, and the beneficial use thereof, to exceptional charges, exceptional taxes, and exceptional rules and regulations, and of certain powers of Government to be exercised by the said heads of the said Departments of the Government of the United States, without any warrant or authority under or in connection with the Constitution of the United States, or of any act of Congress, but wholly contrary both to the Constitution of the United States, and to the acts of Congress aforesaid. And that the defendant has refused, and now refuses to acquiesce in or submit to

39 the said rules or regulations, or accept or enter into the same except insofar as any thereof (if any there be) are consistent with the Constitution of the United States, or the laws of Congress adopted pursuant to the same.

And the defendant further alleges in that behalf that all of the right and authority of the Federal Government, under and in con-

nection with the ownership and use of the public lands, is vested in the Congress of the United States, and that neither the Executive Department of the United States, or any representative or member of the Executive Department of the United States, has any power, authority or jurisdiction whatsoever over any of the public lands of the United States, except as expressly authorized by an act of Congress of the United States conferring such power and authority upon such Executive officer.

The defendant further alleges and claims:

a. That after the admission of the State of Utah into the Union on an equal footing with the original states, the Congress had no power, under the Constitution of the United States, to prevent the appropriation of water, or the construction, maintenance or use of reservoirs, flumes, or conduits, or other works or structures, essential to or properly connected with any of the public or other beneficial uses of water, or upon or in connection with the public lands of the United States.

b. That the Statutes of the State of Utah, hereinbefore mentioned, were valid, and are valid and enforceable, and not in conflict with the Constitution of the United States, or any power thereby conferred upon Congress.

c. That the Acts of Congress approved March 3, 1891, January 21, 1895, May 14, 1896, May 11, 1898, February 15, 1901, and February 1, 1905, did not, nor did any other act or acts of Congress supersede, modify, or in any way affect Sections 2339

40 or 2340 of the Revised Statutes, or confer upon the Secretary of the Interior, or the Secretary of Agriculture, any power to prevent the appropriation of water, or the construction, maintenance or operation of reservoirs, flumes, or conduits, or other works or structures, for or properly connected with the beneficial use of the waters of the State of Utah, or any other state.

d. That if any of the acts of Congress herein mentioned, or any other act of Congress, were interpreted to prevent, or to confer upon the Secretary of the Interior, or the Secretary of Agriculture, the power to prevent the construction or maintenance of reservoirs, flumes or conduits, or any of the power houses, transmission lines, or other structures or works necessary to the appropriation and beneficial use of water and the distribution and beneficial use of the electric power generated thereby, such act of the Congress would be unauthorized and in conflict with Article IV of Section 3, and the Fifth and Tenth Amendments of the Constitution of the United States, and void.

e. That the Congress has no power to compel, and has not conferred, or attempted to confer upon the Secretary of the Interior, or the Secretary of Agriculture, the power to compel the defendant to comply with the regulations herein mentioned, or enter into any special use agreement, or to prevent or interfere with the maintenance, operation or use of the reservoirs, flumes or conduits, power houses, transmission lines, or other works or structures, referred to in the bill of complaint herein.

Wherefore, defendant prays that plaintiff take nothing by virtue

41-129 of its complaint and that the defendant have such relief as may be agreeable to equity, and be hence dismissed with its costs.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,  
*Solicitors for Defendant.*  
FRANK H. SHORT,  
CLYDE C. DAWSON,  
S. A. BAILEY,  
H. R. WALDO,  
*Of Counsel.*

Received copy of above September 10, 1914.

WILLIAM W. RAY,  
*Attorney for Plaintiff.*

Filed with Exhibits September 10, 1914. Jerrold R. Letcher, clerk.

\* \* \* \* \*

130 And afterwards and on the 10th day of September, 1914, the defendant The Beaver River Power Company filed its Disclaimer to the bill of complaint herein, which being entitled in said Court and cause, is in words and figures following, to-wit:

*Disclaimer.*

131 To the Honorable the Judge of the District Court of the United States within and for the District of Utah:

*Disclaimer of the Defendant the Beaver River Power Company to the Bill of Complaint of Plaintiff.*

Comes now the defendant above named, the Beaver River Power Company, and disclaims any right, title or interest in and to those certain hydro-electric power works described in Paragraph 3 of said bill of complaint or to the subject matter of said action.

Wherefore, defendant prays that plaintiff take nothing by virtue of its bill of complaint, and that this defendant may have such relief as is agreeable to equity and be hence dismissed with its costs.

(Signed)

FRANK GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,

*Solicitors for Beaver River Power Company.*

(Signed)

FRANK H. SHORT,  
CLYDE C. DAWSON,  
S. A. BAILEY,  
H. R. WALDO,

*Of Counsel for Beaver River Power Company.*

Received copy of above this September 10, 1914.

WILLIAM W. RAY,  
*Attorney for Plaintiff.*

Filed September 10, 1914. Jerrold R. Letcher, Clerk.

132 And afterwards and on the 15th day of February, 1915, the plaintiff filed its Motion to strike answer herein and for a decree, which, being entitled in said court and cause, is in words and figures, following, to-wit:

*Motion to Strike Answer and for Decree.*

Comes now the above named plaintiff and moves the Court to strike defendant's answer herein and for a decree against the defendants Beaver River Power Company and L. L. Nunn, and shows to the Court the following grounds therefor:

I.

That the answer of the defendant filed herein does not state facts sufficient to constitute a defense.

II.

That the said answer and each separate defense stated therein are insufficient in law to constitute a defense against the cause of action set forth in plaintiff's bill of complaint.

WILLIAM W. RAY,  
*United States Attorney.*  
D. S. COOK,  
*Assistant United States Attorney.*

J. F. LAWSON, *of Counsel.*

Service of the foregoing motion is acknowledged this 15th day of February, 1915.

FRANK J. GUSTIN,  
C. A. GILLETTE &  
DEAN F. BRAYTON,  
*Attorneys for the Defendant.*

Filed February 15, 1915. Jerrold R. Letcher, Clerk.

133 That afterwards and on the 4th day of March, 1915, a Decree was duly filed in the above entitled action, which being entitled in said court and cause is in words and figures following, to-wit:

*Decree.*

134 This cause came on to be heard at this term upon the Bill filed by plaintiff, the answer filed by L. L. Nunn, defendant,  
4—576



the disclaimer filed by defendant, The Beaver River Power Company, a corporation, and plaintiff's motion to strike defendant's answer, for a decree. The same was argued by counsel and the said motion being sustained, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That the defendant, L. L. Nunn, and The Beaver River Power Company, a corporation, his, its or their officers, agents, servants, employees, successors and assigns are hereby enjoined and restrained from maintaining and operating his, its, or their power house and other out buildings, consisting of stables and dwelling houses, transmission lines diversion dams, flume, wood and steel pressure pipe lines, and telephone lines, as now located upon the following described land, the property of the United States, to-wit:

All of Section twenty-eight (28), Township twenty-six (26) South, Range five (5) West, Salt Lake Base and Meridian; the north-west quarter ( $\frac{1}{4}$ ) of Section sixteen (16), the West half ( $\frac{1}{2}$ ) of Section nine (9), the north-east quarter ( $\frac{1}{4}$ ) of Section eight (8),—except that portion of said quarter section included in Millsite No. 4430, as shown on Plaintiff's Exhibit "A" attached to Plaintiff's Bill of Complaint,—all of Section five (5), all in Township twenty-seven (27)

South, Range five (5) West Salt Lake Base and Meridian;  
135 Sections thirty-four (34), thirty-three (33) and twenty-seven (27), Township twenty-six (26) South, Range five (5) West, Salt Lake Base and Meridian; the location of all of said pipe lines, flumes, dams, power house and out-buildings, transmission and telephone lines being more particularly shown by the Plat attached to the complainant's bill on file in this Court, and marked "Plaintiff's Exhibit A".

The plaintiff be and is hereby decreed and adjudged to be the true and lawful owner of the lands herein above described, and every part and parcel thereof, and its title thereto is adjudged and decreed to be quieted and confirmed as against all claims, demands and contentions whatsoever of the defendants, or either of them.

That said defendant L. L. Nunn pay to the complainant its costs incurred herein, taxed at \$15.25, and that complainant have execution therefor.

That the injunction herein ordered shall take effect from and after ninety (90) days from the date of entry of this decree.

Dated this 4th day of March, 1915.

J. A. MARSHALL, Judge.

Filed March 4th, 1915. Jerrold R. Letcher, Clerk.

136 And afterwards and on the 5th day of April, 1915, the following Exceptions of the complainant were entered which being entitled in said Court and Cause is in words and figures following, to-wit:

#### *Exceptions.*

At this day comes W. W. Ray, United States District Attorney, and on his motion, it is Ordered that the exceptions of the complain-

ant to the refusal of the court to decree an accounting and damages as prayed for in the bill of complaint be entered.

J. A. MARSHALL, *Judge.*

April 5, 1915.

137 That afterwards and on the 30th day of April, 1915, the defendants herein filed their Petition for Appeal and Order allowing same, which, being entitled in said court and cause is in words and figures following, to-wit:

*Petition for Appeal and Order Allowing Same.*

138 The above named defendants, Lucien L. Nunn and the Beaver River Power Company, a corporation, conceiving themselves aggrieved by the decree made and entered on the 4th day of March A. D. 1915 in the above entitled proceeding, do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,

*Attorneys for Defendants and Appellants.*

FRANK H. SHORT,  
CLYDE C. DAWSON,  
S. A. BAILEY,  
H. R. WALDO,

*Of Counsel.*

Salt Lake City, Utah, 1915.

And now, to-wit, on April 30th 1915, it is ordered that the foregoing Claim for Appeal be allowed.

J. A. MARSHALL,  
*District Judge.*

Filed April 30, 1915. Jerrold R. Letcher, Clerk.

139 And afterwards and on the same day the defendants herein filed their Assignment of Errors, which being entitled in said court and cause, is in words and figures following, to-wit:

*Assignment of Errors.*

Now on this 30th day of April A. D. 1915, come the above named defendants, Lucien L. Nunn and The Beaver River Power Company, and say that the decree made and entered herein, on the 4th day of March, 1915, granting the injunction prayed for in the plaintiff's

Bill of Complaint, is erroneous and against the just rights of said defendants for the following reasons:

The court erred in sustaining plaintiff's motion to strike the answer of defendant, Lucien L. Nunn, and in granting an injunction herein and in rendering the decree herein:

1. Because, in sustaining said motion and granting the injunction and in entering said decree herein, the court held that said defendant and his predecessor in interest did not have and had not acquired, by virtue of the facts admitted by the record herein, vested and accrued rights to the use of the waters of Fish Creek and Picnic Creek, and in the incidental and necessary rights of way over the land of the plaintiff within the State of Utah, under the laws of the State of Utah and of the United States, including the right to change the place of use and the purpose for which said water might be used.

140 2. Because, in sustaining said motion and granting said injunction and in entering said decree, the court held that the said defendant and his predecessors in interest did not have and had not acquired vested and accrued rights in and to the waters of Fish Creek and Picnic Creek within the State of Utah, with the right to appropriate and use the incidental and indispensable easements over the lands of plaintiff upon the giving of notice of their intention to appropriate said waters, and by commencing work designed to effect such appropriation, as set forth in defendant's answer.

3. Because, in sustaining said motion and in granting said injunction and in entering said decree herein, the court held that the withdrawal of said lands from sale and entry deprived defendants of their rights to complete said work, and that the continuance and completion of said work and the operation of said hydro-electric plant, although begun and carried on in good faith and in compliance with the laws of the State of Utah, constituted a trespass and a purpresture upon the lands of the plaintiff described in its bill of complaint.

4. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that the laws of the State of Utah governing the appropriation and beneficial use of water, set forth in defendant's answer, with relation to the lands of the United States, are in effect null and void for the assumed reason that they are in conflict with the Constitution of the United States, and particularly with Clause 2, Section 5 of Article IV thereof, whereas no such conflict exists.

5. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that under  
141 said clause of the Constitution of the United States the plaintiff has governmental powers over the appropriation and use of water and the electric power generated therewith and the business conducted in connection with the same within the State of Utah which it does not have in other States of the Union in which there are no public lands, the effect of such holding being to deprive such State of Utah of her police power over the waters within her borders, and the industries and business conducted wholly within said State,

and such holding is in violation of the Constitution of the United States and the Tenth Amendment thereof, and deprives said State of Utah of her constitutional equality with the original States of the Union.

6. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that the Acts of Congress of May 14th, 1896 (29 Stat. 120) and February 15th, 1901 (31 Stat. 790) repealed or superseded Section 2339 of the Revised Statutes of the United States, with respect to rights of way over public land for the use of water for the purpose of generating and transmitting electric power, whereas such construction of said Acts is not in accordance with the intention of Congress in passing the same and said Section was not by said Acts or either thereof repealed or superseded, and such construction is contrary to the Constitution of the United States in that it deprives the State of Utah of its police powers over the appropriation and beneficial use of water in violation of the provisions of said Constitution and of the Tenth Amendment thereof, and in that it deprives the defendants of vested and accrued rights to the use of said waters as well as the incidental and necessary easements over the public lands without due process of law in violation of the Fifth Amendment of the Constitution of the

United States of America, and in that it arrogates to the 142 United States of America governmental powers over the appropriation and beneficial use of waters and of a business and industry conducted wholly within the State of Utah, and control and regulation of enterprises and industries therein which are dependent upon the beneficial use of water, and which require easements traversing public lands, which powers are not granted by, but which are asserted contrary to the provisions of the Constitution of the United States.

7. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that the said defendant and his predecessors in interest had no right under the facts admitted by the record in this cause to appropriate necessary easements over the public land in connection with the appropriation and beneficial use of water within the State of Utah, and in compliance with its laws, without first obtaining the express permission of the Secretary of the Interior if such land was not reserved, or of the Secretary of Agriculture if such land was included in a forest reserve.

8. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that the United States of America, the plaintiff herein, was entitled to an injunction restraining, preventing and destroying a public use within the State of Utah, which is authorized by the eminent domain statutes of such State, whereas any other proprietor of land would be limited in such case to an action for damages.

9. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that the plaintiff was not estopped by its conduct, under the facts admitted by the record in this case, to deny that the defendants had a vested right in the easements over the said land described in plaintiff's bill of

complaint, for the operation and maintenance of said hydro-  
143 electric plant of defendant.

10. Because no grounds for equitable relief are stated in plaintiff's bill of complaint, and said bill of complaint should have been dismissed for want of equity.

11. Because the court erred in sustaining said motion and in granting said injunction and in entering said decree for the reason that the regulations of the Department of the Interior and of the Department of Agriculture respecting rights of way over public lands within the State of Utah for the use of water for the purpose of generating and transmitting electric energy, compliance with which regulations by the defendant it is one of the purposes of this action to enforce, are unauthorized by any legislation of Congress, are unreasonable, are contrary to and in violation of the laws of Congress, and are unconstitutional, null and void, for the further reason that said regulations assume for the United States governmental powers which are not granted to it by the Constitution, over the appropriation and use of water for any purpose or in any connection except in connection with navigation; for the further reason that they deprive the State of Utah of its police powers of control over the appropriation and beneficial use of water within said State in violation of the Constitution of the United States and the Tenth Amendment thereof; for the further reason that said regulations deprive the defendants of vested and accrued rights to the use of water without due process of law, in violation of the Fifth Amendment of the Constitution of the United States, and for the reason that they impose a tax and excise upon the business and operations of the defendants, which tax or excise is not uniform throughout the United States, is not authorized by Congress and is in violation of Clause 1,  
144 Section 8, Article 1 of the Constitution of the United States.

12. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that notwithstanding it was alleged and admitted that the said waters had been appropriated and the right thereto had vested and accrued under the laws of the State of Utah, and the rights of way over the public lands described in the complaint had been used and appropriated and were indispensable in connection therewith, and that electric power was being generated, sold and distributed within said State for public uses and purposes which were indispensably necessary to the industries of said State and to the inhabitants thereof and which said State could compel to be continued for the benefit of the inhabitants of said State, that, nevertheless, the plaintiff had the right and power to eject the defendants from said rights of way and the use thereof and prevent the appropriation of such water, and take away and destroy the right thereto and to prevent and prohibit the carrying on of the said public-service industry within said State and to deprive the citizens and inhabitants of said state thereof, although they are entitled to such services and to be protected in the same by said State of Utah and under its laws.

13. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court held that by the creation and establishment of such forest reserves within the said state



pursuant to executive order by the President of the United States, the said State of Utah and its inhabitants had been deprived of all right under the laws of the United States in connection with the appropriation and beneficial use of water within such forest reserves and the rights of way necessary and incident thereto, although, by the  
145 laws of Congress, it is expressly provided and intended that the said forest reserves may be entered upon for all lawful purposes, including the purpose and the right to appropriate and make beneficial use of the waters therein for all lawful and beneficial purposes under and in accordance with the laws of said State of Utah.

14. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court erred for the reason that no injury or damage accrued or could accrue to the United States of America by reason of the acts complained of, and because its right, if any, on account of any such injury or damage is waived by the Ninth Section of the Act of Congress of July 26th, 1866, Section 2339 Revised Statutes of the United States, and because, prior to and under Sections 2339 and 2340 of the Revised Statutes of the United States, it has always been the practice of the United States of America to dispose of its lands subject to vested and accrued rights to the use of water and easements connected therewith, without making any deduction in the price or acreage of such lands on account of the existence of the right to use such water and easements.

15. Because the court erred in sustaining said motion and in granting said injunction and in entering said decree, for the reason that the answers of the defendants and appellants herein, and each separate defense therein stated constitutes in law and in equity a defense and defenses to the bill of complaint herein.

16. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court erred for the reason that by Sections 2339 and 2340 of the Revised Statutes of the United States the existence and validity of local customs, law and decisions of the Courts governing the appropriation of water are recognized and confirmed and said Section 2339 declares that the possessors  
146 and owners of such vested rights to the use of water and the rights of way therefor for mining, agricultural, manufacturing and other purposes shall be maintained and protected in the same, and that said Section 2339 has not been repealed or modified by any subsequent legislation of Congress, and said Section is in effect a recognition by Congress of the right of the States to control the appropriation and use of water for all purposes except navigation, and that the title of the United States to its public lands is held in subordination to such right.

17. Because, in sustaining said motion and in granting said injunction and in entering said decree, the court erred for the reason that said bill of complaint should have been dismissed for want of jurisdiction, because the State of Utah is a necessary and indispensable party to said action.

Wherefore, the said defendants, the appellants herein pray that the decree heretofore entered in this cause be reversed, and that the said District Court of the United States for the District of Utah, Cen-



tral Division, may be directed to enter a decree dissolving and vacating the injunction granted under said decree.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,

*Attorneys for Defendants and Appellants.*

FRANK H. SHORT,  
CLYDE C. DAWSON,  
S. A. BAILEY,  
H. R. WALDO,  
*Of Counsel.*

Filed April 30, 1915. Jerrold R. Letcher, Clerk.

147 And afterwards and on the same day the defendants herein filed their Bond on Appeal, which being entitled in said Court and cause, is in words and figures following, to-wit:

*Bond of Appeal.*

Know all men by these presents:

That Lucien L. Nunn and The Beaver River Power Company, a corporation, organized under the laws of the State of Colorado, and having its principal office at Salt Lake City, Salt Lake County, in the State of Utah, as principals and A. L. Woodhouse of Richfield, State of Utah, as surety, are held and firmly bound unto the United States of America in the sum of \$5,000 to be paid to the United States of America to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of April, 1915.

Whereas, the above named Lucien L. Nunn and The Beaver River Power Company have prosecuted an appeal to the Supreme Court of the United States to reverse the decree for an injunction granted in the District Court of the United States in and for the District of Utah in the above entitled suit on the 4th day of March, 1915;

Now therefore, the condition of the above obligation is such that, if the said Lucien L. Nunn and The Beaver River Power Company shall prosecute their said appeal to effect, and answer all  
148 damages and costs if they fail to make good their pleas, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered this 30th day of April, 1915.

THE BEAVER RIVER POWER  
COMPANY,  
By A. L. WOODHOUSE,  
*General Manager.*

A. L. WOODHOUSE, *Surety.*

Signed and executed in the presence of:  
FRANK J. GUSTIN.

Approved:  
J. A. MARSHALL.

Filed April 30, 1915. Jerrold R. Letcher, Clerk.

149 And afterwards and on the same day the defendants herein filed their motion and notice to suspend and modify injunction, which being entitled in said Court and Cause, is in words and figures following, to-wit:—

*Motion and Notice to to Suspend and Modify Injunction.*

Comes now the defendants and appellants above named and respectively move the Court for an order herein suspending and modifying the injunctive portion of the decree heretofore entered and given in the above entitled cause upon such terms, as to bond or otherwise as may properly secure the rights of the said plaintiff and appellee.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,  
*Attorneys and Solicitors for The Beaver River  
Power Co. and Lucien L. Nunn, Defendants  
and Appellants.*

FRANK H. SHORT,  
CLYDE C. DAWSON,  
S. A. BAILEY,  
H. R. WALDO,  
*Of Counsel.*

To William W. Ray, United States Attorney:

Please take notice that on the 30th day of April, 1915, defendants and appellants will move the Court for an order as in the foregoing motion expressed.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,  
*Attorneys and Solicitors for The Beaver River  
Power Co. and Lucien L. Nunn, Defendants  
and Appellants.*

Received a copy of the foregoing Motion and Notice this 30th day of April, 1915.

W. W. RAY,  
*U. S. Attorney.*

Filed April 30, 1915. Jerrold R. Letcher, Clerk.

150 And afterwards and on the same day an Order granting motion to suspend and modify injunction and fixing supersedeas bond was filed herein, which being entitled in said court and cause is in words and figures following, to-wit:—

*Order Granting Motion and Fixing Supersedeas Bond.*

On this 30th day of April, 1915, came the Beaver River Power Company, a corporation, and Lucien L. Nunn, defendants and appellants in the above entitled cause and presented to the Court their petition for appeal and an assignment of errors accompanying same, praying also that an order be made suspending the injunction and all further proceedings herein pending the determination of such an appeal by the Supreme Court of the United States.

In consideration whereof, the court does allow the appeal prayed for and orders that the injunction and all other proceedings be suspended upon the defendants giving bond according to law in the sum of \$5,000.00, which shall operate as a supersedeas bond.

J. A. MARSHALL, *Judge.*

Filed April 30, 1915. Jerrold R. Letcher, Clerk.

151 And afterwards and on the same day the defendants herein filed their Præcipe for Transcript on Appeal, which being entitled in said court and cause is in words and figures following, to-wit:—

152 *Præcipe for Transcript on Appeal.*

To the Clerk of the United States Court for the District of Utah:

You will please prepare and forward to the Supreme Court of the United States of America at Washington, D. C. a typewritten transcript of the record and proceedings of the above entitled cause, and include therein:

1. Plaintiff's Bill of Complaint.
2. Answer of Defendant, Lucien L. Nunn.
3. Disclaimer of defendant, The Beaver River Power Company.
4. Motion to strike answer and for a decree.
5. Order on same and
6. Decree.
7. Petition for Appeal and Order allowing appeal.
8. Assignment of errors.
9. Motion and Notice to suspend and modify injunction.
10. Order granting motion and fixing supersedeas bond.
11. Bond on Appeal.
12. Præcipe for transcript on appeal.
13. Certificate of Clerk.
14. Citation.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,

*Solicitors for Defendant and Appellant.*

FRANK H. SHORT,  
CLYDE C. DAWSON,  
S. A. BAILEY,  
H. R. WALDO,  
*Of Counsel.*

153 Received copy April 30th, 1915.

WILLIAM W. RAY,  
*Attorney for the United States.*

Filed April 30, 1915. Jerrold R. Letcher, Clerk.

154 In the District Court of the United States in and for the  
District of Utah.

UNITED STATES OF AMERICA, Plaintiff and Cross-Appellant,  
vs.

LUCIEN L. NUNN and THE BEAVER RIVER POWER COMPANY, a Corporation, Defendant and Cross-Appellee.

*Cross-Appeal.*

155 And afterwards and on the 5th day of June, 1915, the plaintiff and cross appellant herein filed its Petition for Cross Appeal and Order Allowing same, which, being entitled in said court and cause is in words and figures following, to-wit:

*Petition for Cross-Appeal and Order Allowing Same.*

The above named plaintiff, the United States of America, conceiving itself aggrieved by the decree made and entered on the 4th day of March, A. D. 1915, in the above entitled proceeding, doth hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM W. RAY,  
*United States Attorney for the District of Utah,*  
*Attorney for Plaintiff and Cross-Appellant.*

J. F. LAWSON,  
*Of Counsel.*

And now, to-wit: on this 5th day of June 1915, it is Ordered that the foregoing claim for Appeal be allowed as prayed.

J. A. MARSHALL,  
*District Judge.*

Filed June 5th, 1915, Jerrold R. Letcher, Clerk.

156 And afterwards and on the same day the plaintiff and cross appellant filed its Assignments of Error, which being entitled in said court and cause, are in words and figures following, to-wit:

*Assignments of Error.*

Comes now the above named plaintiff, the United States of America, by William W. Ray, United States Attorney for the District of Utah, and makes and files this its Assignments of Error:

1. The Court erred in refusing to decree that defendant account and make corresponding pecuniary payment to the plaintiff for the value of the use of lands of the plaintiff by the defendant to be measured by the duration of such enjoyment, the net power capacity of the power plant of the defendant, and the scale of charges adopted in the regulations of the Secretary of Agriculture governing similar cases during the period of said use, as set forth in plaintiff's bill of complaint herein.

2. That the trial court erred in refusing to decree that defendant pay to the plaintiff the reasonable value of the use of the lands of plaintiff, as set forth and prayed for in its bill of complaint.

Wherefore Plaintiff prays that said decree be modified and amended and that said District Court be directed to enter a decree herein, in accordance with the prayer of plaintiff's bill of complaint, and as may be in conformity with the rules of equity.

WILLIAM W. RAY,  
United States Attorney, and  
J. F. LAWSON,  
*Solicitors for Plaintiff.*

157 Copy of above received this 4th day of June, 1915.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE &  
DEAN F. BRAYTON,  
*Attorneys for Defendant.*

Filed June 5, 1915. Jerrold R. Letcher, Clerk.

158 And afterwards and on the same day the plaintiff and cross appellant filed its *Præcipe for Transcript on Cross Appeal* herein, which being entitled in said court and cause is in words and figures following, to-wit:

*Præcipe for Transcript on Cross-Appeal.*

To the Clerk of the United States Court for the District of Utah:

You will please prepare and forward to the Supreme Court of the United States of America at Washington, D. C., a typewritten transcript of the record and proceedings of the above entitled cause, and include therein,

1. Plaintiff's Bill of Complaint.
2. Answer of the defendant Lucien L. Nunn.
3. Disclaimer of the defendant The Beaver River Power Company.

4. Motion to strike answer and for a decree.
5. Order on same, and
6. Decree
7. Exceptions to Refusal of Court to allow accounting.
8. Petition for Cross Appeal and Order allowing same.
9. Assignments of Error of Cross Appellant.
10. Præcipe of cross appellant for transcript on Appeal.
11. Certificate of Clerk.
12. Citation.

WILLIAM W. RAY,  
*United States Attorney for the District of Utah,*  
*Attorney for Plaintiff and Cross Appellant.*

J. F. LAWSON,  
*Of Counsel.*

159      Received copy of the foregoing this 5th day of June, 1915,  
                  FRANK J. GUSTIN,  
                  CHARLES A. GILLETTE &  
                  DEAN F. BRAYTON,  
                  *Attorneys for The Beaver River Company*  
                  *and Lucien L. Nunn.*

Filed June 5, 1915. Jerrold R. Letcher, Clerk.

160      UNITED STATES OF AMERICA,  
                  *District of Utah, ss:*

I, Jerrold R. Letcher, Clerk of the United States District Court for the District of Utah, do hereby certify that the foregoing pages numbered from one to 162 inclusive, contain a full, true and complete transcript of all the pleadings, proceedings and records now on file in said office in a certain cause heretofore adjudicated in said court wherein the United States of America was plaintiff, and Lucien L. Nunn, and the Beaver River Power Company, a corporation, were defendants, as full and complete as it purports to contain and made pursuant to the præcipes filed therein by the respective parties to the appeal and cross appeal.

I further certify that the original Citations are hereto attached and herewith returned with the transcript of the record in said cause.

In testimony whereof, I have affixed my official signature and the seal of said Court at Salt Lake City in said District this 19th day of June, A. D. 1915.

[Seal United States District Court, District of Utah.]

JERROLD R. LETCHER,  
*Clerk United States District Court,*  
*District of Utah.*

[Canceled 10-cent Revenue Stamp.]



161 In the District Court of the United States in and for the  
District of Utah.

In Equity. No. 421.

UNITED STATES OF AMERICA, Plaintiff and Appellee,

vs.

LUCIEN L. NUNN and THE BEAVER RIVER POWER COMPANY, a Corporation, Defendants and Appellants.

*Citation.*

UNITED STATES OF AMERICA, ss.

The President of the United States to the United States of America and to William W. Ray, United States District Attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in the City of Washington, D. C. within sixty days from the date of this writ, pursuant to an appeal duly allowed and filed in the Clerk's office of the District Court of the United States for the District of Utah on the 30th day of April, 1915, in a cause wherein Lucien L. Nunn and The Beaver River Power Company are appellants and you are appellee, to show cause, if any there be, why the decree rendered against appellants as in said appeal mentioned should not be corrected, and, why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 30th day of April, in the Year of our Lord One Thousand Nine Hundred and Fifteen.

J. A. MARSHALL,  
*District Judge.*

Copy received this 30th day of April, 1915.

WILLIAM W. RAY,  
*U. S. Att'y.*

162 In the District Court of the United States in and for the District of Utah.

No. 421. In Equity.

UNITED STATES OF AMERICA, Plaintiff and Appellant,

vs.

LUCIEN L. NUNN and THE BEAVER RIVER POWER COMPANY, a Corporation, Defendants and Appellees.

*Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States to Lucien L. Nunn and The Beaver River Power Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in the City of Washington, D. C. within sixty (60) days from the date of this writ, pursuant to an appeal duly allowed, and filed in the Clerk's office of the District Court of the United States for the District of Utah on the 5th day of June, 1915, in a cause wherein the United States of America is appellant, and you are appellee, to show cause, if any there be, why the decree rendered therein should not be corrected, and why speedy justice should not be done to the appellant in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States this 5th day of June in the year of our Lord One thousand nine hundred and fifteen.

J. A. MARSHALL,  
*District Judge.*

Received a copy of the foregoing this 5th day of June, 1915.

FRANK J. GUSTIN,  
CHARLES A. GILLETTE,  
DEAN F. BRAYTON,  
*Attorneys for Lucien Nunn and  
The Beaver River Power Company.*

163 In the Supreme Court of the United States, October Term, 1915.

No. 576.

LUCIEN L. NUNN & BEAVER RIVER POWER COMPANY, Appellants,  
v.  
THE UNITED STATES.

No. 577.

THE UNITED STATES, Appellant,  
v.  
LUCIEN L. NUNN & BEAVER RIVER POWER COMPANY.

*Stipulation as to Printing of the Record.*

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record herein the regulations of the Departments of Interior and Agriculture, referred to in the answer as Exhibit "A," shall be omitted by the clerk; said regulations appearing in the record in the case of Beaver River Power Co. v. United States and United States v. Beaver River Power Co., Nos. 574 and 575, October Term, 1915, pages 32 to 134 inclusive.

JNO. W. DAVIS,  
*Solicitor General.*  
FRANK H. SHORT,  
*Counsel for Nunn et al.*

February 8th, 1916.

164 [Endorsed:] 576—24,859, 577—24,860. Nos. 576 and 577. In the Supreme Court of the United States. October Term, 1915. Lucien L. Nunn et al, Appellants, v. The United States. The United States, Appellant, v. Lucien L. Nunn et al. Stipulation as to Printing of the Record.

165 [Endorsed:] File Nos. 24859 and 24860. Supreme Court U. S. October term, 1915. Term Nos. 576 and 577. Lucien L. Nunn et al., Appellants, vs. The United States. The United States, Appellant, vs. Lucien L. Nunn et al. Stipulation as to parts of record to be omitted in printing. Filed February 10, 1916.

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1912**

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**No. [REDACTED] 202**

**UTAH POWER & LIGHT COMPANY, APPELLANT,**

**vs.**

**THE UNITED STATES**

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**No. [REDACTED] 203**

**THE UNITED STATES, APPELLANT,**

**vs.**

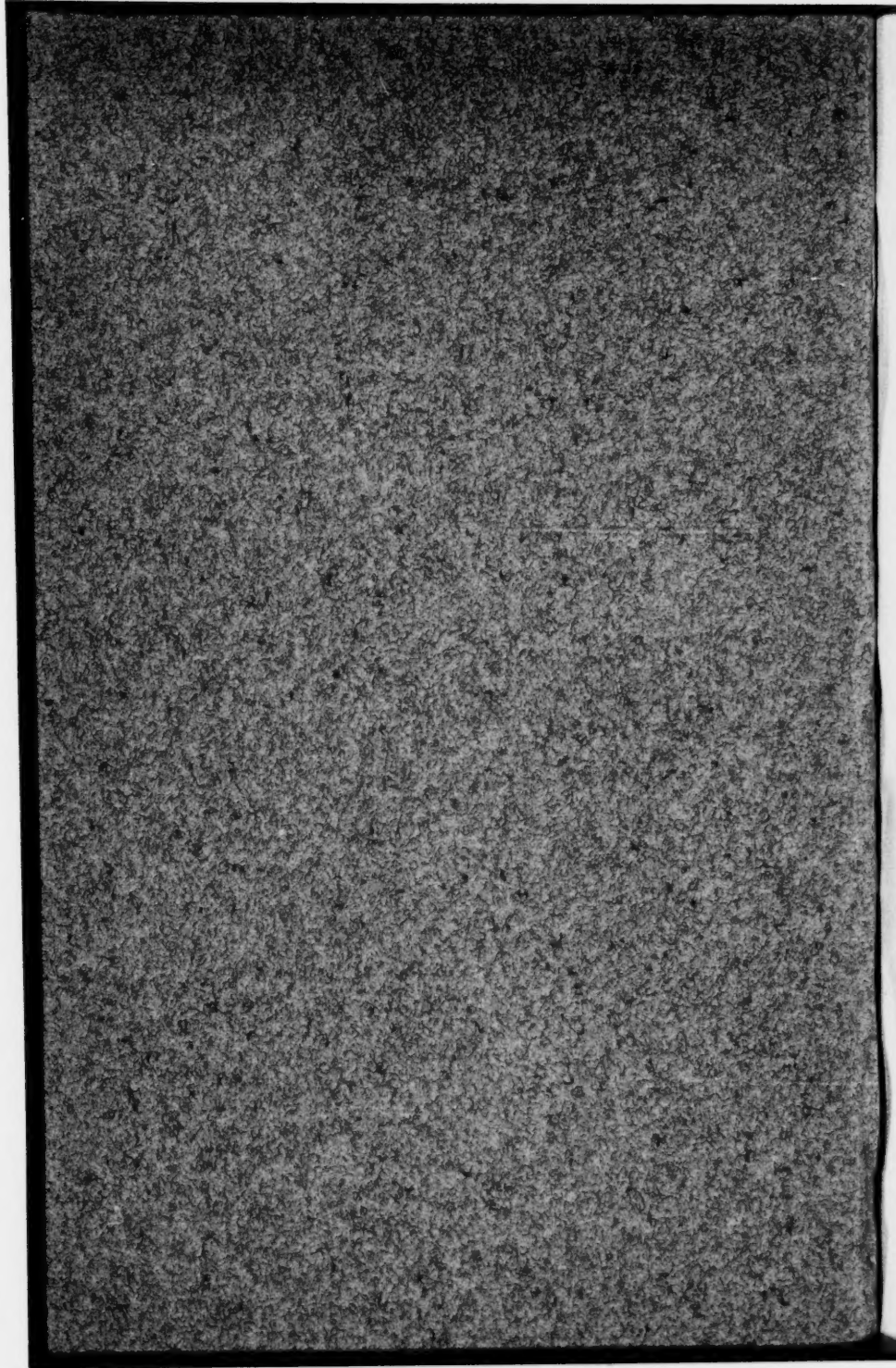
**UTAH POWER & LIGHT COMPANY.**

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**APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF UTAH**

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**ARGUMENT SUBMITTED BY JOHN B. DIXON AS  
AMICUS CURIAE**



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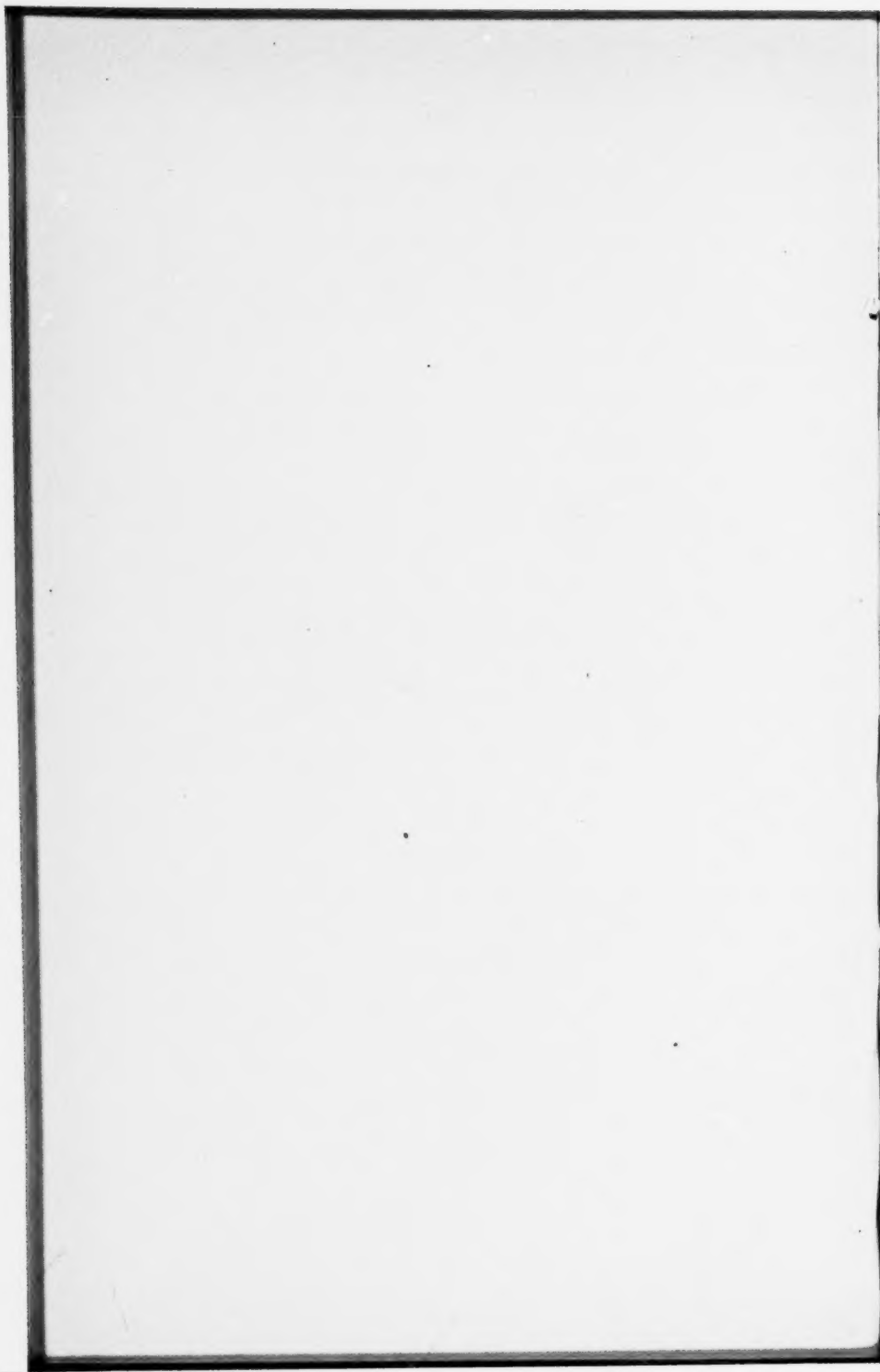
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(30341)



**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1915.

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**No. 572.**

UTAH POWER & LIGHT COMPANY, APPELLANT,

*vs.*

THE UNITED STATES.

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**No. 573.**

THE UNITED STATES, APPELLANT,

*vs.*

UTAH POWER & LIGHT COMPANY.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF UTAH.

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**ARGUMENT SUBMITTED BY JOHN R. DIXON AS  
AMICUS CURIAE.**

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**Statement.**

In the bill of complaint it is alleged that since on or about the first day of December, 1906, the defendant company has been operating certain hydro-electric power works

in the State of Utah, including a reservoir and pipe lines or conduits constructed upon the lands of the United States for the storage and conveyance of water for use in the generation of electric power; that on July 1, 1910, the lands upon which the conduits and reservoir are situated were, by executive proclamation, reserved and included in the Wasatch National Forest; that no permission for the construction or operation of the conduits or reservoir was ever granted to the defendant company, and no permit or authority to occupy or use said lands for said purposes was ever given by the Secretary of the Interior or other officer of the United States prior to or since their inclusion in the Wasatch National Forest.

In its answer the defendant company alleges that the pipe lines or conduits and reservoir were completed prior to December 1, 1906; that the power house, water motors, electric generators and other machinery and apparatus, whereby the kinetic energy acquired by the water has been transmuted into electrical energy, are and have always been situated upon the property of the company, facts which in the state of the pleadings are admitted; that the construction and operation of the conduits and reservoir were permitted and authorized by the laws of the United States, and that by virtue of said laws it has a lawful right to the continuing use of the same without any formal permission or authority from the Secretary of the Interior or any other officer of the United States.

The Government also complains of the occupancy and use of its lands in other minor respects by the defendant company, but the issue of law thus raised with reference to the pipe lines or conduits and reservoir is overshadowing; for its correct determination involves, on the one hand, a definition of the extent to which the Congress has subordinated the riparian rights of the United States to local laws, and, on the other hand, a definition of the power of a State to protect wild waters existing within its borders, but flowing on the public lands, from misuse.

**ARGUMENT.****I.**

THOUGH THE POWER TO CONTROL THE USE OF THE WATERS OF NON-NAVIGABLE STREAMS FLOWING ON THE PUBLIC LANDS INHERES IN THE STATES, THE EXERCISE OF CONTROL BY THE STATES IS DEPENDENT UPON THE WILL OF THE CONGRESS; FOR BY FORCE OF SECTION III OF ARTICLE IV OF THE CONSTITUTION THE CONGRESS, AND THE CONGRESS ONLY, CAN SUBORDINATE THE RIPARIAN RIGHTS OF THE UNITED STATES TO NON-GOVERNMENTAL USES. AS TO SUCH STREAMS, WHAT THE STATES CONTROL AND WHAT THE CONGRESS BY THE NINTH SECTION OF THE ACT OF JULY 26, 1866, RECOGNIZED THEY COULD CONTROL ARE THE PURPOSES FOR WHICH THE WATERS RUNNING WILD WITHIN THE STATES MAY BE TAKEN AND USED WHEN THE CONGRESS HAS GRANTED THE WAYS FOR DIVERTING THE WATERS.

This court has on several occasions construed the ninth section of the act of July 26, 1866, yet it is now called upon to consider it in a special aspect, by reason of the contention of the Government that, so far as power production is concerned, it has been modified by subsequent legislation, if, indeed, it ever extended to the appropriation of water, to be used in the manufacture or generation of electric power.

Prior to 1866 the Government, as a landed proprietor, was vested with the exclusive right to the use of the water of non-navigable streams flowing in the territory of the United States, for in a state of nature riparian owners only can have lawful access to streams (*Palmer vs. R. R. Commission*, 138 Pacif., 1001). Such right was *property* of which the United States could not be deprived without its consent (*Rio Grande Dam & Irr. Co. vs. U. S.*, 174 U. S., 703).

In that case it was said that, though the power to change the common-law rule resides in each State, it is subject to the



limitation that the riparian rights of the United States cannot be destroyed except by express authority of Congress.

The riparian rights of the United States never, however, imported any ownership in the *corpus* of the waters running wild on the public lands. Such rights are incident to and inhere in the land itself when bordering on the streams, and are therefore covered in section III of article IV of the Constitution by the words "or other property of the United States." It goes without saying that the power of disposition and regulation conferred by that section could not be delegated, directly or indirectly, to State legislatures.

In admitting a State the consideration or apparent approval which the Congress gives to a State constitution is not binding upon any department of the Government, for in such respect the Congress determines nothing. If it *appears* to it that there is no conflict between the constitution of the State seeking admission and the Federal Constitution, the Congress is empowered to admit the State. Consequently a State constitutional or legislative declaration purporting to dedicate the waters of all natural streams to the use of the people, subject to appropriation as provided for by the State laws, is ineffective to destroy, and as we shall see has no inherent force to impair or abridge the riparian rights of the United States.

But the power of the United States to protect its property, as defined in the *Camfield* case (167 U. S., 525), does not extend to the *corpus* of the flowing waters, for water running wild is the property of no one unless and until it has been subjected to dominion by lawful capture. It is for this reason that the State, under its police power, may, to prevent waste and pollution, control the *purposes* for which the wild water of non-navigable streams flowing within its borders may be taken for use.

The power of the State in this regard is somewhat analogous to that which it may exercise in the matter of the taking of wild game, the difference being that whilst any one complying with State regulations may enter upon the

open unreserved public lands to take game or divert water—the taking of game involves no continuous occupation and use of land such as is requisite and necessary for the diversion of water for beneficial uses; hence the police power of the State, *ex proprio vigore*, has full play as to taking of game, at least upon the unreserved public lands; but not so as to the diversion of water thereon.

Therefore, though the States may prescribe the uses which may be made, the right to divert water on the public domain for an authorized use is derived from the consent of the Congress in the exercise of its constitutional powers over the property of the United States. All appropriations made prior to 1866, although supported by the law of necessity recognized by the local courts, were nevertheless initiated in trespass, and so far as the United States was concerned no property right accrued to the users of water until the confirmation of the appropriations by the great right-of-way act of 1866.

A collision between Federal and State legislation as to the non-navigable streams flowing on the *unreserved* public lands was avoided by the passage of that act.

Notwithstanding the impression which widely prevails as to State control, what the Congress recognized by the act of 1866, and all that it recognized, was the police power of the States to control the *purposes* for which the waters running wild may be diverted according to priority of possession *when the Congress has consented* to the diversion over the public lands and *granted* the ways therefor.

The pertinent part of the act is as follows:

“Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.” \* \* \*

This court has construed this clause to be an "unequivocal grant" (*Broder vs. Natoma M. Co.*, 101 U. S., 274). The grant, however, is to the *individual appropriators*, and, resolved into its elements, confers upon such appropriators the right of access to the streams for the purpose of diverting water, to the detriment of the riparian rights of the United States, and rights of way over the public lands for the accomplishment of such purpose. On the other hand, the power of the States to regulate the *purposes* for which the wild water may be diverted, according to priority of possession, is recognized by said section. For it is the *purposes*, and the *purposes only*, for which the wild water may be taken and used that fall within the power of the States to control.

The import of the words, "rights to the use of water for \* \* \* other purposes," in the act of 1866 is to be determined from the words following thereafter—that is to say: "And the same are recognized and acknowledged by the local customs laws and decisions of courts." Consequently they relate not only to any and every use then recognized by the local customs, laws, and decisions of courts, but to any purpose which should thereafter be recognized by the local laws and decisions of courts, inasmuch as this tribunal has decided that the act applied not only to existing rights, but was intended to, and did, operate prospectively.

The reference to State control in the acts of the Congress subsequent to that of 1866 is to be understood in the sense we have adverted to—that is to say, control over the *purposes* for which the waters running wild may be diverted, according to priority of possession; for instance, section 18 of the right-of-way act of 1891 provided:

"\* \* \* And the privileges herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under the authority of the respective States and Territories."

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This provision, wherein "purposes" is the guiding word, does not, as is sometimes contended, recognize the power of the State to confer the right to enter upon the lands of the United States and divert water, and all State statutes that purport to so authorize are merely declaratory of what the Congress has consented to. Such statutes, except as to the *purposes* for which the water may be used in the order of priority of possession, have no inherent force. The incorporation in the act of 1891 of the provision cited, and like provisions in some subsequent acts, is no more than a reiteration in substance of the recognition in the act of 1866 of State control over the *purposes* for which the waters running wild may be diverted.

## II.

THE ACTS OF 1866-70, GRANTING RIGHTS OF WAY FOR DITCHES OR CANALS AND RESERVOIRS ON THE PUBLIC LANDS, ARE INOPERATIVE AS TO NATIONAL FORESTS, AND NO RIGHT OF WAY FOR SUCH PURPOSES CAN EXIST THEREIN BY FORCE OF SAID ACTS, OR EITHER OF THEM, UNLESS THE RIGHT ACCRUED BEFORE THE ESTABLISHMENT OF THE RESERVATION. AS TO THE OPEN UNRESERVED LANDS, HOWEVER, THOSE ACTS, UNLESS MODIFIED BY SUBSEQUENT LEGISLATION, OPERATE AS THE EXPRESS PERMISSION OF CONGRESS TO CONSTRUCT DITCHES OR CANALS OR RESERVOIRS ON SAID LANDS TO EFFECT THE USE OF WATER FOR ANY PURPOSE AUTHORIZED BY THE STATES, INCLUDING THE GENERATION OF ELECTRIC POWER.

We have stated that section 9 of the act of 1866 operates as a grant of the right of way for ditches and canals over unreserved lands only. In this connection attention is invited to the qualification contained in the section as follows:

"\* \* \* but whenever any person, in the construction of any ditch or canal, injures or damages

the possession of any settler on the public domain, the party committing such injury shall be liable to the party injured, for such injury or damage."

It is inferable from this language, standing alone, that the Congress intended to grant the right of way for ditches **and canals** only over the public domain open to settlement or occupancy for general purposes, and that such was the intent is reasonably certain when it is considered that the motive for the passage of the act was to aid and encourage the development of the unsettled territory.

Sometimes in general acts affecting the public domain reserved lands are expressly included. On the other hand, sometimes reserved lands are expressly excepted from such acts. Legislation, however, with reference to reserved lands is ordinarily of a special character. When, therefore, a general act, or section of a general act, grants rights of way over the "public lands" or over the "public domain" and makes *no allusion* to reservations, the latter are deemed to be excluded from the operation of such act or section, the same as though expressly excepted. Hence it was that the Attorney General, in an opinion rendered October 5, 1907, said:

"It is true that the Congress and the courts have recognized a right to appropriate water on the public lands under State laws or local customs, but lands within the forest reserves are not covered by general statutes referring to the public lands" (vol. 26, p. 421, Opinions of Attorney General).

As we take it, the act of 1866 never had any force or effect as to *reserved* lands, but was and is effective only as to those lands which are open to settlement or location for general purposes.

So long, then, as the act of 1866 continues in force and unmodified, water may be appropriated on the *unreserved* public lands for *all purposes authorized by the State*, in-

cluding the generation of electric power. In some States the use of water for power purposes is authorized by express statute; in others its use for such purposes has been adjudged to be authorized by statutes conferring the right of appropriation for any beneficial use. It cannot, therefore, reasonably be doubted that the appropriation of water for use in the generation of electric power is within the meaning of the acts of 1866 and 1870.

### III.

THE SCOPE OF THE RIGHT-OF-WAY PROVISIONS OF THE ACTS OF 1866-'70 WAS IN NO RESPECT LESSENED BY THE ACT OF MAY 14, 1896. INDEED, THE ACT OF 1896 WAS DESIGNED TO ENABLE THE OWNERS OF WATER RIGHTS, ACQUIRED UNDER THE ACTS OF 1866-'79 AND CONFORMABLY TO STATE LAWS, TO USE SUCH RIGHTS FOR SUPPLYING WATER TO ELECTRIC POWER WORKS ON THE PUBLIC DOMAIN, EITHER RESERVED OR UNRESERVED, WHENEVER THE SECRETARY HAVING JURISDICTION SHOULD DEEM IT COMPATIBLE WITH THE PUBLIC INTERESTS TO PERMIT THE ERECTION OF THE POWER PLANTS. THE ACT OF 1896 EXPLAINED.

There are but two acts of Congress covering rights of way for the manufacture or generation of electric power—the act of May 14, 1896, and the act of February 15, 1901—and both, by their terms, apply to reserved, as well as unreserved, lands.

In the act of 1896 for the first time the generation or manufacture of electric power was specifically referred to, and it is that act and the interpretation thereof by the Circuit Court of Appeals for the Eighth Circuit in the case of the *United States vs. Utah Power & Light Co.* (209 Fed., 562), on which the Government relies to show that ditches, canals, and reservoirs cannot be lawfully constructed either upon the open, unreserved public lands, or upon the forest reservations for



use in connection with power production without first obtaining a permit from the Department having jurisdiction. The act was but a single section, and is as follows:

"That the Secretary of the Interior be and hereby is authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of 25 feet, together with the use of necessary ground, not exceeding 40 acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purpose of generating, manufacturing or distributing electric power."

It must be conceded the natural import of this language is that the Secretary may permit the use of rights of way 25 feet in width upon which to erect distributing lines, and the use of a tract of ground not exceeding 40 acres, upon which to erect the generating plant or manufactory; for commercial electric power is produced by the operation of a factory or generating plant and the diversion of water thereto by means of a ditch or canal is no part of the manufacturing or generating process, but merely a method of conveying a commodity to be used in operating the plant.

We do not, of course, assert it as a fact, but it is quite possible that the act was so viewed by Mr. Assistant Attorney General Van Devanter when, in an opinion rendered shortly after its passage, he stated that it had no reference to ditches or canals. But whether we are correct in thus divining the reason which actuated the learned Assistant Attorney General is immaterial, for it is demonstrable in two ways that his conclusion was entirely correct:

*First.* The act imposed no condition whatever as to the form of manufacturing or generating electric power. It applied to any available method. The Secretary was, therefore, authorized to permit the right of way of the dimensions prescribed for the manufacture or generation of electric power in steam plants. This, we think, cannot be denied.

In steam plants only a small quantity of water (obtained from a well or other source in proximity to the plant itself) is used from which to develop the necessary steam for generating the electric power. Attention is now invited to section 8 of the act of 1866, as follows:

“And be it further enacted that the right of way for the construction of highways over the public lands not reserved for public uses, is hereby granted.”

It cannot be seriously contended that the act of 1896 so modified this section of the act of 1866 that after 1896 it was no longer lawful to build a highway on the unreserved public lands, over which coal or oil might be transported to a steam plant without a permit from the Secretary of the Interior. Yet there would be just as much reason to contend that section 8 of the act of 1866 was so modified by the act of 1896 that coal or oil could not be transported to a steam electric plant over a highway on the unreserved public lands without first obtaining a permit from the Secretary, as to contend that section 9 of the act of 1866 as to ditches and canals for the conveyance of water was modified by the act of 1896.

Nor can it be said that there is a distinction because the ditch is privately owned and the highway is not, for, whether a way for the transportation of fuel is or is not a part of a manufacturing plant, is not dependent on the title to the way. On the Pacific Coast oil is sometimes transported in ships to power plants situate on the ocean front. Certainly those vessels are no part of the works for manufacturing or generating electric power, and we apprehend that, should they be acquired by the power company, such circumstance would not transmute them into a part of the manufacturing or generating plant.

It is obvious that ditches or canals whereby water is conveyed for use in electric plants, like highways or private roads over which coal or oil is transported to steam plants for use in generating electric power, are independent of and no part of the manufacturing or generating works.

What we have remarked is fortified by the act of 1901, which, as we shall see, superseded the act of 1896 and other acts authorizing rights of way for various purposes. The reproduction in the act of 1901 of the act of 1896 in a modified form is discernible without the slightest difficulty, as follows:

"That the Secretary of the Interior be and hereby is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forests and other reservations \* \* \* *for electrical plants, poles and lines, for the generation and distribution of electric power.*"

Here is the construction of the Congress itself as to what the act of 1896 was intended to cover. For the language of the two acts describing the *purpose* of the ways is *identical*.

*Second.* The act of 1896 applied to *both* unreserved lands and forest reservations. If, then, it shall appear that the Secretary was without authority prior to 1901 to grant permits for rights of way in national forests for reservoirs in which to impound, or for ditches and canals in which to convey, water to be used in electric plants, it will necessarily follow that the act of 1896 *could have no reference* to ditches or canals or reservoirs to be constructed in national forests. That he was without authority in such respect until the passage of the act of 1901 is clear. We say this advisedly, for by the act of 1897—the *first act passed for the regulation of forest reserves*—it is provided, *inter alia*:

"All water on such reserves may be used for domestic, mining, milling or irrigation purposes, under the laws of the State where such forest reserves are situated, or under the laws of the United States and the rules and regulations established thereunder."

Attorney General Bonaparte had occasion to refer to the two acts as follows:

"It may be well for me to say, however, that I do not think it clear, as seems to be assumed in some of the papers forwarded with your letter, that no charge can be made for water used by persons to whom permits may be granted under the act approved February 15, 1901. Such persons, independently of their permits, would have no right or authority to appropriate the waters in the forest reserves—at all events for such a purpose as the production of electric power, \* \* \* the right to use water on such reserves can be secured, it would seem, only under the provisions of the act approved June 4, 1897" (vol. 26, page 421, Opinions of Attorney General).

Here the condition under which water may be appropriated for power purposes in the national forests, either under State or Federal laws, is pointed out. The reference to the act of 1897 is guarded, no doubt, because the Attorney General had noticed that the consent of the Congress contained in that act was limited to "domestic, mining, milling, and irrigation purposes."

The intent of the act of 1897 is manifest. The Congress was aware that general laws of the United States are not effective as to reservations unless expressly made so; that if the waters flowing in national forests were to be subjected to private use it was necessary to make provision therefor. This accounts for the provision, which *differs from that of the act of 1866*, in that the consent given *does not extend to all purposes* authorized by State laws, but only to "domestic, mining, milling, and irrigation purposes." Hence under the law of 1897 the Secretary had no authority to permit rights of way in the national forests for reservoirs in which to impound, or for ditches or canals in which to convey, water for use in generating electric power.

Therefore, when it is borne in mind that in 1896 the Congress had not yet consented to the diversion of the waters of the national forests *for any purpose whatever*, and that it was not until 1897 that it gave its consent for certain pur-

poses only, to the exclusion of the manufacture or generation of electric power, it becomes evident that the act of 1896 could not possibly refer to ditches or canals or reservoirs, for by its terms it had the same potency as to forest reservations as it had to unreserved lands.

What is here observed, it is quite likely, was noticed by Mr. Assistant Attorney General Van Devanter, but, with all due respect to that great tribunal, was overlooked by the Circuit Court of Appeals for the Eighth Circuit in the case of the Utah Power and Light Company, *supra*. Repeals or amendments by implication are only to be recognized in clear cases of repugnancy. With all due respect to that learned court, we submit that there is no repugnancy whatever between the act of 1896 and the act of 1866.

Indeed, in the light of subsequent legislation, any opposition between the two statutes cannot be when the inclusion of "manufacturing purposes" in section 9 of the act of 1866 is considered. For illustration, we reproduce the pertinent part of said section as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, *manufacturing* or other purposes have vested and accrued \* \* \*"  
etc.

It could not be reasonably contended that the words "manufacturing purposes" are more restricted in their meaning than the words "agricultural purposes" or the words "mining purposes"? We submit that such expressions, all alike, were inserted to be interpreted in a liberal sense, for the rule of reason must be applied, and it was the clear intent of the Congress to encourage mining, agriculture, and manufacturing, not of any particular kind or by any particular process then in vogue, but of every legitimate form and by any process then known or afterwards discovered which would tend to the development of the country.

The act of 1896 was passed, therefore, not to take the manufacture or generation of electric power out of the operation of the act of 1866, but to *supplement* the latter act, though not so expressed, in order that vested water rights, together with the incidental ditches or canals acquired under the act of 1866, might be used for one of the purposes expressly covered by the terms of that act. For it is to be noted that the Congress in the act of 1896 denominated the production of electric power as a *manufacturing process*, which certainly tends to repel the idea that it is repugnant to section 9 of the act of 1866.

The passage of the act of 1896 was probably prompted by the circumstance that, shortly before, hydro-electric plants had been installed in Germany and operated for commercial purposes with complete success.

It was realized by the Congress that the abundant streams of falling water in the territory of the United States could be put to a like use, and thus augment the development of the country. Moreover, that the storage for such purpose would conserve the waters which would otherwise go to waste. But an obstacle stood in the way; for though, as we believe, we have shown that the right existed to appropriate water on the unreserved public lands for power purposes and to convey the same by ditches or canals to the power plants, yet no statute existed which permitted rights of way for the power-houses and distributing lines. To remove this obstacle the act of 1896 was passed.

Again, the act of 1896 was made applicable to both unreserved public lands and forest reservations obviously because at the time of its passage it was a matter of public notoriety that there were existing water rights in streams, which had vested before the inclusion of such streams within the boundaries of forest reserves,—a situation which would recur upon the establishment of additional forest reservations. For this reason the act was formulated so that the owners of such vested water rights might use them in the



production of electric power, and thus be put on an equality with the owners of other rights in streams not included in the boundaries of reservations.

We repeat, therefore, with all due respect to the distinguished court holding otherwise, that the effect of the act of 1896 was not to take the matter of the production of electric power out of the operation of the act of 1866, but, on the contrary, was to supplement the latter, so as to make water rights secured thereunder *available for the purpose* of manufacturing or generating electric power.

Before the argument is concluded it will become evident, we think, that the act of 1896 was superseded by the right-of-way provision of the act of 1901, the only difference between the two concerning ways for the generation of power being as to dimensions. Unless, then, the act of 1901 operated to modify the act of 1866 the act of 1896 could have no such effect.

#### IV.

THE SCOPE OF THE RIGHT OF WAY PROVISIONS OF THE ACTS OF 1866-70 WAS IN NO RESPECT LESSENED BY THE ACT OF FEBRUARY 15, 1901, AS THAT ACT WAS A RE-ENACTMENT WITH MODIFICATIONS OF THE PREVIOUS RIGHT-OF-WAY PROVISIONS OF THE ACTS OF 1891, 1895, 1896, AND 1898, THE CHANGE IN THE ACT OF 1896 BEING MERELY AS TO THE DIMENSIONS OF THE WAYS. ACT OF 1901 EXPLAINED.

The act of 1901 provides for ways, over forest reservations and unreserved lands alike, of uniform dimensions, to be obtained in the same manner in all cases for various purposes. *Irrigation is one of those purposes.* If, then, it is true that as to such purpose the act of 1866 and the act of 1901 are consistent, and that a right of way for irrigation may be acquired under either—that is to say, a possessory right of way, limited to the marginal lines of the ditch or canal, under the act of 1866, or a record right of way, ex-

tending 50 feet on each side of the marginal lines of the ditch or canal, under the act of 1901—then the same must be true when the generation of electric power, or any other purpose covered by the act of 1901 and the acts which it superseded, is considered.

A test as to whether the acts of 1901 and 1866 are consistent is to be found in a comparison of the act of 1901 with the act of 1891, which it superseded, for it has been repeatedly decided by the General Land Office and the courts that the act of 1866 was in nowise affected by the act of 1891.

The only material difference between the act of 1901 and the act of 1891 as to rights of way for irrigation is that under the earlier act, when the Secretary approved the application, a right of way immediately vested in the applicant, whereas under the later act the right does not vest upon the mere approval by the Secretary.

The reason for the change may be divined with certainty. It was this: That although the regulations of the Department, made under the act of 1891, might, and did, require the applicant as a condition precedent to furnish evidence of an existing right to appropriate water under the State laws, yet it sometimes happened that the water right thereafter, for one reason or another, failed. The act of 1891 was defective in that no direct and speedy method was afforded to avoid the consequences of the Secretary's approval in such case or in cases where there was a lack of diligence in constructing the proposed works. To correct this, the Congress so formulated the act of 1901 that the Secretary, as to rights of way for *irrigation* as well as for any other purpose mentioned in the statute, might, for just cause, revoke his action. The power of revocation is expressed in the statute as follows:

"And *provided further*, that any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successors,

in his discretion, and shall not be held to confer any right, or easement, or interest in, to or over any public lands, reservation or park."

This *proviso*, by an adherence to its literal terms, has been very generally misunderstood, but reflection compels the conclusion that it is not to be taken literally. The discretion conferred upon the Secretary is not an arbitrary or tyrannical discretion, but that reasonable discretion which the law always controls to prevent unjust forfeitures. What the *proviso* means is that, when the Secretary has learned that he has granted a permit to one whose water right has failed or to one who is using the permit for speculative purposes in violation of the spirit of the law, the Secretary may revoke the permit—in other words, may revoke it for just cause. On the other hand, when the permittee in good faith proceeds diligently to construct the works, expends large sums of money therefor, and otherwise complies with all the terms of the permit, then the doctrine of executed licenses applies and the power of the Secretary to revoke is gone. For it is inconceivable that the Congress would pass a law which would permit the forfeiture of valuable improvements, made in good faith, at the mere whim of the Secretary. Reason is the soul of law, and, whatever its garb, no statute has a force which is opposed to all reason.

The circumstance that the act of 1891 contains a clause as follows:

"\* \* \* Also the right to take from the public lands adjacent to the line of the ditch or canal material, earth and stone necessary for the construction of such ditch or canal,"

which is not repeated in the act of 1901, does not militate against our view. For, it will be observed, the privilege to take material, earth, and stone necessary for construction is limited to lands adjacent to the *line of the ditch or canal*, and does not extend to lands adjacent to the right of way. If the language were "adjacent to the line of the right of way" instead of "adjacent to the line of the ditch or canal,"

then there might be room to claim that both statutes continue in force. But such clause in the act of 1891 was mere surplusage. For, in authorizing a way 100 feet wide, in addition to the width of the ditch to be constructed in the center, the Congress certainly did not intend that the 50 feet on each side of the marginal limits of the ditch should be boulevards or that they should be mere passageways, but, on the contrary, intended that they might be availed of for any purpose necessary to the construction or operation of the ditch. In a mountainous country extra-lateral territory is essential to build a ditch to grade, and such construction involves the taking of other material, earth and stone, than that removed in digging the ditch. Hence the clause was inserted in the act of 1891 in an explanatory sense only, and a like right is conferred by the act of 1901 the same as though expressed therein.

We think it is quite clear that the right-of-way provision of the act of 1901 as to irrigation superseded that of the act of 1891.

If, then, it shall appear that the act of 1866 was not modified by the granting act of 1891, it will be evident that it could not be affected by the permissive act of 1901, or by the permissive act of 1896, which was superseded by the act of 1901.

The acts of 1866 and 1891 have been repeatedly considered by the General Land Office with reference to each other, and it has been uniformly held that the latter did not repeal or modify the former, as whilst both provided for rights of way for the same purpose, yet the conditions of acquirement and legal *status* of the right which could be acquired under the one statute, being dissimilar from those of the right which could be acquired under the other, no inconsistency existed between the two acts.

*Pesos Irrigation & Improvement Co.*, 15 Land Dec., 470.

*Re Cache Valley Co.*, 16 Land Dec., 192.

*Silver Lake Co. vs. Los Angeles*, 37 Land Dec., 152.

*Re McMillan Reservoir Site*, 37 Land Dec., 6.

We believe no decision, Federal or State, can be found to the contrary. Besides, should there be any doubt, this court has said:

"Where the court is doubtful about the meaning of an act of Congress, the construction placed upon the act by the department charged with its enforcement is in the highest degree persuasive, if not controlling" (*United States vs. Hammers*, 221 U. S., 220).

The sense of the Land Office ruling— all as the decisions by the courts, both Federal and State, to the same effect, is: That the act of 1866 was essentially a provision in aid of the pioneer of limited means, for nothing was required of him except to construct the ditch or canal in order to become vested with a right of way for the diversion of water, a purely possessory right and limited in its extent to the marginal lines of the ditch or canal.

That his more fortunate brother may secure a like right of way arises from the generality of the statute, the benefits of which extend, without discrimination, to all who may avail themselves thereof.

On the other hand, the provisions of all subsequent right-of-way acts were designed to provide for rights founded on technical proceedings, made matters of record and entailing considerable expense, to the end that the ways should be excluded from grants of the lands over which they should extend—rights something more than merely possessory. Such provisions were made to meet larger requirements and to better assure the titles, so as to induce the investment of capital in enterprises for the development of great areas of land lying distant from the streams; for extensive mining and lumbering operations; for furnishing water for domestic and other beneficial uses, and for generating electric power.

The provisions for such purposes, contained in the acts of March 3, 1891, January 21, 1895, May 14, 1896, and May

11, 1898, were finally merged in the act of February 15, 1901, the evident intent of which was to establish a system as to such enlarged rights of way, covering forest reservations and unreserved lands alike, whereby the ways for the purposes enumerated in the superseded acts should be *uniformly* 50 feet wide on each side of the marginal lines, or 50 feet on each side of the center lines, according to the character of the works.

It is manifest that rights of way of such dimensions could not with safety be granted under an act similar to that of 1866, for if they should be the right would be claimed in every case regardless of the necessity therefor. The reason, therefore, why Congress imposed the condition that permits should be obtained for such rights of way is quite obvious.

If we are correct that the act of 1901 was, and was intended to be, but a re-enactment in one comprehensive section of the right-of-way provisions of the acts of 1891, 1895, 1896, and 1898, with certain modifications, and a *proviso* empowering the Secretary to enforce diligence and to circumvent those who, with fraudulent intent, should make application for speculative purposes, it follows that the manufacture or generation of electric power were taken out of the operation of the act of 1866 by the act of 1896, and on every subject covered by the act of 1901 germane to the appropriation of water, *including irrigation*, was by that act taken out of the operation of the act of 1866.

There is no middle ground. The clear intent of the act of 1866 was to enable the States to exercise control over *all the purposes* for which the waters running wild on the open unreserved public lands might be used—a power which until then was restrained by the force and effect of section III of article IV of the Constitution. If Congress had intended to change a policy of thirty years' standing and bring on a collision between Federal and State legislation by excepting any particular *purpose* from the operation of that act, it is entirely improbable that it would resort to language which contains no allusion to water or any use thereof.



When two statutes can be easily harmonized and both preserved without doing violence to the language of either, and this, too, in accord with a long-established policy, artificial rules of construction cannot be resorted to without danger of defeating the legislative will.

The appropriation of water in forest reservations for any and all purposes is controlled by different principles; for, as we have said, the acts of 1866-'70 are inoperative as to such reservations, except as to water rights which had vested prior to their creation. The purposes for which water may be appropriated in national forests are governed by the acts of 1897 and 1901. To what extent such acts let down the bar of restraint raised by section III of article IV of the Constitution it is not necessary to consider under the issue now under discussion.

## V.

### CONCLUSION.

In conclusion we most respectfully submit:

*a.* The right-of-way provisions of the acts of 1866-'70 remain in full force unaffected by any subsequent legislation. Their plain intent was and is to permit any person to enter upon the open unreserved public lands, and in the order of priority of possession (determinable in the State courts) to divert water from the non-navigable streams flowing on said lands for *any purpose whatever recognized by the local laws and decisions of courts.*

*b.* As the conduits and reservoir described in the bill of complaint were constructed upon the open unreserved public lands, their construction for the diversion of water for a purpose *authorized by the laws of Utah* operated, by force of the acts of 1866-'70, as a grant from the United States of the right of way for said conduits and reservoir, at least from the time of their completion and the application of the water to the intended use.

c. That the subsequent inclusion of the lands, on which the conduits and reservoir are situate, in the Wasatch national forest, could not impair such vested right, and the power company is lawfully entitled to operate said conduits and reservoir for supplying water to power works *situate on its own lands* without a permit from the Secretary of the Interior or any other officer of the United States.

Respectfully submitted by

JOHN R. DIXON,  
*As Amicus Curiae.*

(30341)



# In the Supreme Court of the United States.

OCTOBER TERM, 1915.

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UTAH POWER & LIGHT COMPANY, APPELLANT, v. THE UNITED STATES.	} No. 572.
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THE UNITED STATES, APPELLANT, v. UTAH POWER & LIGHT COMPANY.	} No. 573.
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BEAVER RIVER POWER COMPANY, APPELLANT, v. THE UNITED STATES.	} No. 574.
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THE UNITED STATES, APPELLANT, v. BEAVER RIVER POWER COMPANY.	} No. 575.
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LUCIEN L. NUNN & BEAVER RIVER POWER Company, appellants, v. THE UNITED STATES.	} No. 576.
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THE UNITED STATES, APPELLANT, v. LUCIEN L. NUNN & BEAVER RIVER POWER Company.	} No. 577.
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APPEALS AND CROSS-APPEALS FROM THE DISTRICT COURT  
OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

**MOTION BY THE UNITED STATES TO ADVANCE.**

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled causes for joint hearing on a day convenient to the court.

These are three suits in equity brought by the United States to enjoin the Utah Power & Light Company, The Beaver River Power Company, and Lucien L. Nunn and The Beaver River Power Company from further maintaining and operating certain hydro-electric power plants with appurtenant structures for conveying and applying water and transmitting electricity, upon national forest lands, without first securing the permission of the United States and complying with the laws thereof, and with the rules and regulations promulgated by the Secretary of Agriculture in that behalf. The United States also seeks an accounting of the reasonable value of the use and occupation of the lands.

The three cases were heard below on motions to strike out the answers or amended answers, and for decrees in favor of the United States. These motions prevailed and final decrees were entered enjoining the further use and occupation of the lands, but without awarding an accounting of the value of their use. In each case defendants appealed and the United States has taken cross-appeals.

The contention of the power companies in both the amended answers and the assignments of error is *inter alia* that they had acquired certain accrued and vested rights in the land involved and that to

enjoin them from their use and occupation is a violation of the rights of the power companies as guaranteed to them by the Constitution.

The cases are of importance to the Government in the matter of preserving the national forests, and for that reason an early determination thereof by this court is desirable.

Opposing counsel concur in this motion.

JOHN W. DAVIS,  
*Solicitor General.*

DECEMBER, 1915.

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# Supreme Court of the United States.

OCTOBER TERM, 1916.

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No. 572

UTAH POWER & LIGHT COMPANY,  
Appellant,

VS.

THE UNITED STATES,  
Appellee.

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No. 573

THE UNITED STATES,  
Appellant,

VS.

UTAH POWER & LIGHT COMPANY,  
Appellee.

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## REPLY BRIEF FOR UTAH POWER & LIGHT COMPANY.

The Government has combined in one brief all its arguments and authorities for six separate appeals of which only two affect the Utah Power

& Light Company. Large portions of the Government's brief have no application to the Utah Power & Light Company. Some of our arguments are passed without any answer; others are misunderstood or misquoted, and answered only when distorted to such a form as to be obviously unsound, and others are answered merely by the statement that the law is settled otherwise.

We desire to call attention to and to emphasize the following facts:

1. The power house of the Utah Power & Light Company is not located on Government land. The only structures of that Company which are on Government land are, a reservoir and pipe line, and a telephone line, tramway and small buildings necessary and incidental to the maintenance and use of such reservoir and pipe line.

2. The structures of the Utah Power & Light Company were placed upon the Government land before it was incorporated in a forest reserve. When these structures were built, the land was unappropriated and unreserved public land, open to entry and sale under the general land laws.



## POINT I.

**The land of the United States within a State which is not used or needed for any Governmental purpose of the United States is subject to the power of eminent domain of the State.**

The effort of the Government to dismiss this question as one settled by the Constitution and decisions of this Court must fail. The statements of this Court on which the Government relies were not made in connection with any consideration of this question. They were, to use the language of the Government itself, "merely convenient expressions", to explain the doctrine that the states cannot interfere with the governmental operations of the United States or the doctrine that the public domain belongs to the United States and not to the individual states, and that for private purposes the states have no power to dispose of that land. Some of these statements have been overruled or rejected by later decisions, and some of them are obviously unsound, if literally applied to all cases.

For instance, the statement made in *McCulloch v. Maryland*, 4 Wheat. 316, that all the property and all the institutions of the United States are constructively without the local, territorial jurisdiction of the United States in every respect, and for every purpose (Government's Brief, p. 124) is obviously untrue. It has been established by decisions of the Supreme Court and frequently recognized by Congress that land of the United States within a state, except that described in paragraph 17 of Section 8 of Article I of the Constitu-

tion and that actually used for a governmental purpose, is subject to the local, territorial jurisdiction of the state.

*Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525;

*Chicago, R. I. & P. Ry. Co. v. McGlinn*, 114 U. S. 542;

*Ward v. Race Horse*, 163 U. S. 504;

*Kansas v. Colorado*, 206 U. S. 46;

*Forest Reserve Act* of June 4, 1897 (30 Stat. 35, 36) ;

*Reclamation Act* of 1902, Sec. 8 (32 Stat. 390).

Furthermore, the statement that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete without other limitations than those found in the Constitution itself is not literally correct. There is no doubt that a power actually delegated by the Constitution to Congress is supreme, but in determining the scope of such powers, the courts have in some cases imposed by implication limitations upon language which was in form unlimited. The Constitution confers upon Congress the power to levy and collect taxes without any limitation upon the scope of the power or the subject to which it may be applied. This Court has decided, however, for reasons of comity, that this power should not be construed to authorize Congress to tax the governmental operations of the states.

*Texas v. White*, 7 Wallace, 700;

*South Carolina v. U. S.*, 199 U. S. 437.

It has been said that the grant to Congress of power "to dispose of and make all needful rules and regulations respecting the territory or other

property belonging to the United States" implies "an exclusion of all other authority over the property which would interfere with that power or obstruct its exercise". The Government seems to think this means that the grant of this power implies an exclusion of all other "authority" over the public land, but such a view ignores the qualifying words which follow after the word "property". It is fundamental that the states cannot interfere with the exercise by Congress of a power conferred upon it by the Constitution. We recognized that principle throughout our argument. The problem is to determine the scope of the power. For that purpose the statement quoted does not help.

It is well settled that the grant of this power to Congress does not exclude all "authority" of the states over the public land. It does not exclude the power of the states to make rules and regulations respecting the public land. A state can pass laws taxing the property and franchises of railroads upon Government land, compelling such railroads to fence their lines on Government land for the protection of straying cattle, and prohibiting the killing of game upon Government land, under its general police power, in the same manner and to the same extent as upon other land.

*Chicago, Rock Island & Pacific R. R. Co. v. McGlinn*, 114 U. S. 542.

*Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525.

*Ward v. Race Horse*, 163 U. S. 504.

Surely these laws are rules and regulations respecting the territory or other property of the United States. They regulate the use of the land. They interfere with the absolute rights of the pro-

prietor. The right to hunt has been defined by this Court as an easement or profit *à prendre*.

*Kennedy v. Becker*, 241 U. S. 556, 562.

The Government attempts to show that our argument would seriously cripple the sovereign powers of the United States because of the many and varied uses which have been held to be public and for which a state has power to take private property. It says that the discretion and judgment of Congress would go down in a contest with the discretion and judgment of the State Legislature. This attempt can hardly be sincere for we have recognized throughout that the state's power of eminent domain could not apply to land which was used or needed for a governmental purpose of the United States; and it stands to reason that the determination of Congress that the use of any particular land was necessary for a federal public purpose (*i. e.*, a purpose within the powers conferred upon Congress by the Constitution) would supersede the determination of a state that the use of the same land was necessary for a state public purpose. The needs of the nation are superior to the needs of a state. It is impossible, under our view, that there could be any conflict between the nation and the state.

The Government argues that the power of eminent domain is dependent upon the relation of sovereign and subject, and questions our statement that the power of eminent domain cannot be waived while the power to tax can. It is fundamental and has been repeatedly held that the power of eminent domain is an attribute of sovereignty, essential to and inherent in Government; that it is indestructible and inalienable, and that it applies to all property, real and personal,

tangible and intangible within the jurisdiction of the sovereign. The power depends upon the jurisdiction of the sovereign over the property, rather than its jurisdiction over the owner of the property.

- Adirondack Ry. Co. v. New York State*,  
176 U. S. 335, 346;  
*Kohl v. U. S.*, 91 U. S. 367;  
*New York, etc., Ry. Co. v. Boston, etc.,  
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*Hale v. Lawrence*, 21 N. J. Law, 714;  
*Sholl v. German Coal Co.*, 118 Ill. 427,  
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*Leisse v. St. Louis, etc., R. R. Co.*, 2 Mo.  
Appeals, 105, 109;  
*Cooley Constitutional Limitations*, p.  
525.

On the other hand, it is well settled that the power to tax may be waived with reference to particular property for some valid consideration. This does not mean that a sovereign can barter away its entire power of taxation.

- Humphrey v. Pegues*, 16 Wall. 244, 249;  
*Stone v. Mississippi*, 101 U. S. 814, 817;  
*Stearns v. Minnesota*, 179 U. S. 223.

The distinction between the two powers and the right of a State to waive them is clear. An agreement not to exercise the power of eminent domain with respect to any particular property would interfere with the power and duty of the State to guard the welfare of its citizens. It would forever prevent the use of that land for a public purpose however urgent or pressing the public need might be. On the other hand, an agreement not to tax particular property has no effect except to eliminate that property as a source of income to the

State. The State loses nothing except the amount of the taxes collectible from that property. This loss is measurable in money for which presumably the State receives compensation in the form of the consideration upon which the waiver of taxation is based. Such an agreement does not interfere in any way with the power or duty of the State to guard the interests of its citizens.

We submit that in the last analysis the answer to the question whether property of the United States is subject to the power of eminent domain of the State depends upon whether the exercise of the power invades or interferes with the sovereign powers or governmental operations of the United States, and the answer to that question depends in each case upon the "use" for which the property is held, *i. e.*, whether it is used or needed for a governmental purpose. The question cannot be answered by any narrow or technical interpretation of particular words in the Federal Constitution. It must be answered by the application of broad fundamental principles with respect to the immunity of a sovereign from interference in the discharge of its functions.

We submit that the Government makes a fundamental error in assuming that the mere "holding of land" is a sovereign or governmental function of the United States. This has apparently resulted from a loose interpretation of statements which have been made to the effect that the United States has no power to hold property as a monarch may for private or personal uses, and that it holds all its property in trust for all the people of the United States. We attempted to show in our main brief that these statements mean merely that the United States holds its property in the interest of the pub-



lic just as every state and every municipal subdivision of a state holds its property in the interest of the public, and that there is nevertheless a clear and important distinction between public property which is, and that which is not, used or needed for a governmental purpose. This distinction has been recognized with respect to property of the United States and foreign sovereigns, as well as property of the states and municipal corporations generally.

*The Davis*, 10 Wall. 15.

*The Fidelity*, 8 Fed. Cases, 1189, Case No. 4758.

*Long v. The Tampico*, 16 Fed. Rep. 491 (S. D. N. Y. 1883).

*Rees v. United States*, 134 Fed. Rep. 146.

The error of the Government appears clearly if we attempt to analyze the power of the United States to hold property. This power necessarily belongs to every sovereign as an attribute of sovereignty. It is necessary for the discharge of the functions of the sovereign and must be implied like other incidental powers which are inherent in sovereignty, such as the power of eminent domain, the power to create corporations, etc. These incidental powers are not the objects for which the sovereign exists, but are rather the means which the sovereign employs in order to accomplish the objects for which it exists. The powers to accomplish these objects may be called substantive powers to distinguish them from incidental powers. The United States has no substantive powers except those conferred by the Federal Constitution. It has such incidental powers as are ordinary attributes of sovereignty or are usual for a sovereign to employ as a means to accomplish an end.

The Federal Constitution confers upon the United States the substantive power to admit new states into the Union, but provides that new states shall not be formed or created within the jurisdiction of any other state. The United States accordingly must have power to acquire territory for the ultimate purpose of creating new states after proper settlement and development. But after this object has been accomplished and the new state has been created, it is difficult to see how the mere "holding" of land within that state is a sovereign or governmental function of the United States.

There is nothing in Section 3 of Article IV or any other provision of the Federal Constitution which places land upon any different footing from other property of the United States. This section applies generally to the "territory or *other property belonging to the United States*". It applies equally to every kind and species of *property* which may *belong to the United States*. The function of holding or disposing of land is no more sovereign or governmental than the function of holding or disposing of other kinds of property.

This section does not confer upon the United States any powers with respect to holding or disposing of property which it would not have as incidents of sovereignty. Nor was it intended to exclude any methods of disposition, or methods by which property could be taken from the United States, which would have existed in spite of sovereignty. The section does not mean that an act of Congress is the only means by which the United States can dispose of, lose or be deprived of property (see cases cited in Point VI of our main brief). The section does not increase or affect the immunity of

the United States from interference in the discharge of its functions.

*The Davis*, 10 Wall, 15.

*Long v. The Tampico*, 16 Fed. Rep. 491.

Some light upon this subject may be obtained from a study of the history of the Constitution. Before the adoption of the Constitution the United States, as created by the Articles of Confederation, owned large tracts of public land which had been ceded by individual states, to enable the Government to raise money to meet the expenses of the war. Although the Articles of Confederation contained no grant of power to Congress to hold, manage or dispose of such land, or to create territorial governments—or to admit new states—the Congress declared that such land should be disposed of for the common benefit of the United States, and should be settled and formed into distinct republican states which should become members of the Federal Union with the same rights of sovereignty, freedom and independence as the other states, and proceeded to create territorial governments. That the Congress had power to do these things was publicly doubted (“The Federalist” paper, No. 38).

*Constitutional History of the United States*, by George Tichnor Curtis, Chap.

V, pp. 90-97, Chap. 27, pp. 532 *et seq.*

*Story on the Constitution*, 5th Ed., Vol. II, pp. 195 *et seq.*

The main purpose of inserting Section 3 of Article IV in the Constitution was to remove any doubt that might exist respecting the power of Congress to govern the territories, to admit new

states into the Union and to dispose of the land belonging to the United States. It was probably intended that the power to make all needful rules and regulations respecting the territory should include the power to govern the territory, although the addition of the words "or other property belonging to the United States" might indicate that the power related only to property belonging to the United States and not to land within a territory belonging to others. In any event, history shows that the raising of money through the sale of the land and the creation of new states, in order to strengthen the Union, were the main and ultimate objects for which the territory was acquired and held.

There is nothing in the contemporaneous history to indicate that anybody supposed that the ownership by the United States of large tracts of land within the newly admitted states would impair their sovereign powers. There was considerable opposition to the adoption of the Constitution upon the ground that it conferred too much power upon the federal government. The states were reluctant to relinquish their sovereign powers. The tenth amendment was adopted for the purpose of alleviating fears that the powers conferred might be too broadly construed. The doctrine that a power granted to Congress should not be deemed an exclusive power, unless the existence of a similar power in the states would be absolutely and totally contradictory and repugnant, was publicly expressed in "The Federalist" and was later adopted by this Court ("The Federalist" paper, No. 32).

*Houston v. Moore*, 5 Wheaton, 49.

The issue in this case is not whether any particular land shall be used for some purpose de-

clared by the state to be necessary in the public interest or some other purpose declared by Congress to be necessary in the public interest, but rather whether particular land shall be used for the former purpose or shall not be used for any purpose. Congress has not declared that the use of the land is necessary for any purpose or that it shall not be used for the development of hydroelectric power. It would not have power to determine whether the use of the land was or was not necessary for such a purpose. That is a public purpose within the power of the State, but not within the power of the United States. The question whether the use of any particular property is necessary for that purpose is essentially a local question which can only be determined by the State.

The only right of the United States involved in this action is one of property, and more narrowly one of remedy. It is merely a question whether for the taking of its land, it shall have the equitable remedy of injunction or the legal remedy of damages, and we fail to see why the legal remedy is not adequate and just.

In spite of everything that has been said by the Government, we submit that the following propositions must stand as established by fundamental principles as well as the authorities:

1. The rights and powers of the United States as the owner of land within a State, which is not used or needed for a Governmental purpose, are governed and determined by the law of the State and are the same as those of other owners of similar land within the same state;

2. Section 3 of Article IV of the Federal Constitution is not a "delegation" of powers by the

states, or a "prohibition" of powers to the states. It is merely a delegation to Congress of powers which are vested in the United States as the owner of property;

3. Section 3 of Article IV of the Federal Constitution does not increase or enlarge the immunity from interference in the discharge of its governmental functions which the United States would necessarily have as an attribute of sovereignty;

4. There are no provisions in the Constitution or other circumstances which indicate or require the interpretation that Section 3 of Article IV is exclusive of any powers which the states would otherwise have with respect to land of the United States;

5. The Federal Constitution should be interpreted in such a manner as not to limit or impair the sovereign powers of the states except in so far as may be necessary to permit the free exercise of the sovereign powers of the United States. The purely proprietary interests of the United States should yield to the sovereign powers of the states;

6. The taking of land or other property of the United States which is not used or needed for a governmental purpose, does not invade or interfere with the sovereign powers or governmental functions of the United States;

7. To hold that the land in question can be taken by the State of Utah for a public purpose does not prejudice any interest of the United States. To hold that such land cannot be taken by the State of Utah for such a purpose would seriously prejudice the interests of the State of Utah.



## **POINT II.**

**The land of the United States in this action was not and is not used or needed for any governmental purpose of the United States.**

The Government has little to say in answer to this point. It seems to rely upon the fact that the land upon which the structures of the Utah Power & Light Company are located is now incorporated in a forest reserve. It frankly recognizes that the land was not so reserved or otherwise appropriated for any purpose when the structures were placed upon it. At that time Congress had not declared any policy with respect to this land.

## **POINT III.**

**The State of Utah has authorized the defendant and its predecessor to use the land of the United States involved in this action for the public purpose of developing and selling electric energy.**

The Government argues that the statutes of the territory and state of Utah to which we refer in our main brief were not intended to apply to public land of the United States and that if they did apply to such land they would be void. The Government, however, admits that the statutes of the

territory were valid by force of Sections 2339 and 2340 of the Revised Statutes, and that the public land referred to could not be any land other than that belonging to the United States. That the statute of the State of Utah enacted in the same language must be deemed to have the same meaning and effect is axiomatic. The description of the land affected by the statute is about as broad as could be imagined and is obviously intended to include all land within the state.

Anybody familiar with the history of the settlement and development of the State of Utah would know that the use of the water on the public land of the United States was essential and that neither mining, agriculture, manufacturing or other industries could have prospered or developed without the use of such water. The idea that the Legislature of the State, when providing for the acquisition of rights of way for the storage and conveyance of water, did not intend to include the public land of the United States, must be rejected as contrary to well-known facts. The customs of the inhabitants to use such water and construct reservoirs and canals upon the public land are alleged in the answer and so well known that the Court would undoubtedly take judicial notice of them.

#### POINT IV.

**The various Acts of Congress recognize that the land of the United States is subject to the local law and that rights of way for the storage and conveyance of water can be acquired without the permission of the Secretary of the Interior.**

We find little in the Government's brief to refute our contentions with respect to the interpretation of the various Acts of Congress. There is a wide and fundamental difference between us. The Government contends that the Acts of 1891, 1895, 1896, 1898, 1901, 1905 and 1911 evidence an intention to regulate and control the use of the public land and to place restrictions upon the uses thereof authorized by the Acts of 1866 and 1870. We contend, on the other hand, that these later Acts were designed to enlarge the uses and protect the users.

The Government states that these Acts were steps in the growth of a policy of conservation, but this statement is merely an assumption which has no basis, except the contentions and policies of the Department of the Interior, and the Department of Agriculture adopted since 1909. There is nothing in any of these acts to affirmatively indicate that Congress had any such policy in mind. The Act of 1891 says nothing about regulations or any kind of supervision. The regulations mentioned in the other Acts were all required to be general. The permit Acts were all in form grants of power to the Secretary of the Interior to permit certain things to be done. Some of these things were

already authorized by other acts without the permit; others were not. All of them contemplated the use of the public land for the purposes mentioned; none of them contained reservations of land or prohibitions against the use of land. The form and language of these acts, as well as their legislative history, shows that they were all intended to facilitate and enlarge the uses of Government land and aid in the settlement and development of the western states. There is not a word to show that they were intended to restrict or discourage uses already authorized by Sections 2339 and 2340.

The legislative history of the Act of 1896 is particularly significant. The Act was originally introduced in the House as an Act to amend the Act of 1891, and provided, in substance, that Section 20 of that Act be amended so as to include the grant of a right of way, together with land not exceeding forty acres, for the location of necessary works and plants for the generation and distribution of electric power. It was referred by the House Committee on the public lands to the Department of the Interior where it came to the hands of the Commissioner of the General Land Office. After studying the proposed Bill, he made a report to the Secretary of the Interior under date of February 15, 1895, which contained the following:

"The sections of the Act of 1891, prescribing, among other conditions, that the right of way is limited to the area, not greater than the prescribed amount, used for the purposes of conducting and storing water for irrigation purposes. This limitation, while perhaps intended to apply to all the purposes contemplated by the bill, can scarcely be so construed, as for the purpose of generating and distributing power poles would be erected and wires strung,

and the right of way, therefore, proposed to be granted by this bill would appear to be absolute to the extent of 100 feet in width. Similar right of way for necessary wagon roads, rail and team roads for the purpose of manufacturing or for the generation and distribution of electric power may perhaps be successfully asserted under the wording of the bill, if enacted, for the bill extends to these purposes the limitations and conditions of the act of 1891 applicable hereto. Limitations as to right of way for the storage and carriage of water may not be held applicable to right of way for the purpose of manufacturing or for the generation and distribution of electric power.

"The bill also proposes to grant the use of land, not exceeding 40 acres, for the location of necessary works and plant for the purpose of manufacturing or for the generation and distribution of electric power. For the reasons before stated this may, by liberal construction, be held to be an absolute grant of the use of the land to the extent of the selection for the purposes stated. The extent of the land which may be selected for the necessary works and plant is too great for those uses unless construed so broadly as to include all sorts of commercial manufacturers and purposes connected therewith, as the raising of appropriate crops and the like. The right of way for the canals of 50 feet on each side of the marginal limits of the water thereof would give a strip of land over 100 feet in width along the whole length of the canal for use for such purposes as may be admissible under the bill, which appears to be ample.

The Act of Congress approved January 21, 1895, to permit the use of the right of way through the public lands for team roads, canals, and reservoirs, to citizens or associations of citizens engaged in the business of mining or quarrying, or of cutting timber and manufacturing lumber, seems to me to indicate the

appropriate policy if it is desired to enlarge the purposes for which the use of rights of way on the public lands may be allowed; and I would therefore recommend that the purposes to which it may seem desirable to extend the use of right of way on the public land may be incorporated in that act by amendment. It seems to me proper that this extension of the use of such easements should be under the full control of the Department as in that act, because of the policy expressed in the proviso in section 18 of the act of 1891 (*supra*) that 'the privileges herein granted shall not be construed to interfere with the control of water irrigation and other purposes under authority of the respective States or Territories', some of the States and Territories having by law given preference to domestic and agricultural uses of water over others, *e. g.*, Colorado, Utah, Idaho and South Dakota. The permission to use the public land for carrying water for miscellaneous purposes should accordingly be allowed in such manner as not to interfere with the control by local law.

"It is my opinion that this bill should not become a law. I would recommend, however, legislation by way of amendment of the act of January 21, 1895, before mentioned, in effect as follows, viz.:"

(Here followed language in which the Act of 1896 was finally passed.)

This explains the discrepancy between the title and the enacting clause of the Act. It also shows that the man who prepared the Act in the form in which it was passed intended that it should "enlarge the purposes for which the use of rights of way on the public lands might be allowed"; that he had in mind chiefly rights of way for electric power houses and transmission and distribution lines, and that he did not intend that this Act any more than



the Act of 1891 should interfere with or supersede Sections 2339 and 2340.

Moreover, the various extracts from debates in Congress, reports of committees and recommendations of departmental officers quoted by the Government refute emphatically the Government's contention. For instance, in explaining the Act of 1898 to the House, Mr. De Vries stated that the purpose of the law was "to extend and enlarge the existing privileges and to allow a license over the public domain for additional purposes not authorized by the preceding acts" (Brief of Government, p. 60). The report of the committee on public lands with respect to the Act of 1901 shows that the bill was intended to extend the opportunities for using the waters on the public lands for mining, electrical, public and other beneficial uses (Brief of Government, p. 69). Similarly the efforts of the Secretary of the Interior to have this Act passed show appreciation of the necessity for rights to store and convey water upon the public land for the development of the industries of the West (Brief of Government, p. 71).

The Government suggests that a right of way could not vest as against the Government under the Act of 1891 without the approval of a map by the Secretary of the Interior (Brief, pp. 45-6). It is evident that the Government has not correctly interpreted the decisions of this court, in *Minneapolis, etc., R. R. Co. v. Doughty*, 208 U. S. 251, and *U. S. v. Minidoka, etc., Co.*, 235 U. S. 211. In the case first mentioned, nothing was said to derogate from the decision of this Court in *James-town, etc., Co. v. Jones*, 177 U. S. 125. It was there held that the Railroad Company had a vested right as against a third party. It is evident, however,

that the Railroad Company claimed under the United States. Its title, if any, was a grant from the United States under the Act of 1875. The third party also claimed by grant from the United States. It is indeed hard to see how the Railroad Company could have acquired a right in the land which was good against the third party unless it was also good against its immediate grantor, the United States.

In the Minidoka case, the Circuit Court of Appeals held that the Railroad Company had not acquired a right of way under the Act of 1875 because it had not filed a map and secured the approval of the Secretary of the Interior. This Court reversed the decision and held clearly that the Railroad Company had acquired a right of way as against the United States. The main question discussed in the opinion was whether homesteaders had power before patent to grant rights of way, but we do not understand the opinion to mean that such homesteaders had power to grant away any property interest of the United States. Their grants gave title which was good as against them, while the Act of 1875 gave title which was good as against the United States.

The Government contends that Sections 2339 and 2340 of the Revised Statutes do not apply to forest reservations (pp. 36-7). When these sections were enacted there was no law authorizing the creation of forest reserves. These sections, however, apply generally to the public domain. The Act of 1891 authorized the President to "set apart and reserve . . . as public reservations" parts of the public lands covered with timber or undergrowth. It does not say anything to indicate that such reservations were to be withdrawn from the operation of Sec-

tions 2339 and 2340. The provisions of the Forest Reserve Act of 1897, quoted in our main brief, show conclusively that the forest reservations were not removed from the operation of those sections. The decision of the Circuit Court of Appeals in the Minidoka case fully sustains our contention. It was there held that public lands withdrawn from entry under the Reclamation Act of 1902 were nevertheless subject to the operation of the railroad right of way Act of 1875 which applied generally to public lands.

*U. S. v. Minidoka, etc., R. R. Co.*, 190  
Fed. Rep. 491.

It may well be that the Act of 1901 was designed to consolidate in one act the substance of the various permit acts in order to simplify administration, but it cannot be inferred from this that the Act was intended to supersede Sections 2339 and 2340 of the Revised Statutes any more than the Act of 1891.

The Government has no authority for its contentions, except decisions of the Land Department, but anybody who attempts to settle the present controversy by application of these decisions has indeed a hopeless task. As late as August 21, 1909, the Acting Assistant Commissioner of the General Land Office wrote a letter to Messrs. Wilson & McClosky with reference to certain flume lines used to convey water for the operation of machinery in the mills of the United Rico Mines Co. and the generation of electricity to light the Town of Rico in the State of Colorado. The flume lines were constructed in or after 1899 upon public land which subsequent to construction and use had been incorporated in the Montezuma Forest Re-

serve. The letter was written in answer to an inquiry respecting the validity of the rights of way. The letter stated:

"If the lines were constructed over the public unreserved lands of the United States, in the absence of any grant of right of way therefor, the right of the party who constructed them would appear to be protected by Sections 2339 and 2340 of the U. S. R. S."

Here we find a ruling of the Interior Department, long after all the Acts in question were enacted and after the structures of the defendant were placed upon the public land, to the effect that Sections 2339 and 2340 were not superseded by the Acts of 1895, 1896 or 1898, and that rights of way acquired thereunder were not affected by the subsequent incorporation of the land in a forest reserve.

The effort of the Government to bring the various acts into harmony with some consistent policy falls of its own weight. It leads to extraordinary and impossible results and the more carefully the argument is studied the more futile it appears. For instance, the Government argues that the Forest Reserve Act of 1897, in providing that all waters on the forest reservations might be used for certain purposes under the laws of the State or the laws of the United States, did not mean that the water might be conveyed over the public land, or that it might be used on the public land. How, then, could anybody use the water at all? The Government would answer, "by obtaining a permit for the use of a right of way". But that answer does not hold water. The purposes mentioned were domestic, mining, milling or irrigation. There was at this time no permit act

covering reservoirs or canals on the forest reservations for domestic, mining or irrigation purposes. The Act of 1895 covering mining purposes did not apply to the forest reservations. There was accordingly no act under which anybody could have acquired a permit for use of a right of way for any of these purposes on the forest reservations. There were no laws of the United States covering reservoirs or canals for these purposes, except Sections 2339 and 2340 of the Revised Statutes and the Act of 1891, which admittedly did not supersede or repeal Sections 2339 or 2340.

We challenge the Government to interpret this language of the Forest Reserve Act as meaning anything other than that Sections 2339 and 2340 and the local lands relating to the appropriation of water and rights of way for the conveyance thereof were applicable to the forest reserve.

One startling result of the Government's contention is that the Act of 1895, which upon its face was a benefit to citizens engaged in the business of mining and quarrying, or of cutting timber and manufacturing lumber, was, on the contrary, a discrimination against this class of citizens. Under the Government's contention this class of citizens was prohibited from constructing reservoirs or canals on the public land without the permission of the Secretary of the Interior, while other citizens were still free to construct them for all other purposes without any permission.

But the most startling result of the Government's contention, and that which must be fatal to their case, appears in connection with the Act of 1898. If their contention is correct it appears that, although Mr. DeVries thought that it was desirable to enlarge and extend the uses for which

reservoirs and canals might be construed so as to include domestic, public and all other beneficial uses, nevertheless the effect of the first section of this Act was to prohibit the construction of reservoirs and canals for any purpose without the permission of the Secretary of the Interior. How is such a prohibition conceivable only one year after the declaration in the Forest Reserve Act that all waters on forest reservations might be used under the laws of the states.

If the Government's interpretation is correct, the first Section of this Act contained comprehensive provisions for rights of way for reservoirs and canals for all purposes, was exclusive of all other methods of acquiring them, and supersede all previous acts providing for them.

How can any such result be consistent with the deliberate and unequivocal declaration of Section 2 of the same Act that rights of way, "*heretofore or hereafter*", approved under the Act of 1891 might be used for purposes of a public nature, and also for purposes of water transportation, for domestic purposes and for the development of power as subsidiary to the main purpose of irrigation? How can the first section supersede the Act of 1891, when the second section recognized that it was to continue in force? That the two sections of this Act overlap and cover in part the same general subject, and that both sections were intended to be effective cannot be doubted. Neither section can be held to supersede the other.



**POINT V.**

**The defendant and its predecessor have not violated any lawful regulations of the Secretary of the Interior or the Secretary of Agriculture respecting the use of a right of way for the storage and conveyance of water, and have the right under the Acts of 1901 and 1905 to maintain and operate their structures upon the land of the United States.**

The Government shows what is the real issue in this litigation when it attempts to meet the argument that a decree in its favor would amount to a confiscation of the defendant's property. It says that the defendant can avoid such a result by complying now with the rules and regulations of the Department. It says that the so-called policy of conservation is not a policy to prevent the use of the land by the defendant, but to subject the defendant to regulation. The Government evidently recognizes that the various Acts of Congress contemplated that the public land should be used in the way in which the defendant is using it. The Government has not complained that the method or purpose of the use by the defendant is improper. The only issue is whether the defendant can be compelled to enter into the use agreement adopted by the Department of Agriculture.

The Government says that if the defendant claims that the regulations are unreasonable it should, nevertheless, apply for and obtain a permit and thereafter contest the validity of the regulations. The difficulty is that if the defendant should enter into the use agreement adopted by the

Department of Agriculture it would agree to pay the taxes now or hereafter imposed, and that the permit might be revoked at any time, and it would thus estop itself to question the validity of the tax or the right of the Department to revoke the permit. The only way in which the defendant could legally question the validity of the regulations is to refuse to enter into the use agreement.

The Government does not make much of an argument to sustain the validity of the regulations. It recognizes that in our government there is no place for arbitrary power, citing *Garfield v. Goldsby*, 211 U. S. 249 (Brief, p. 151), from which it must follow that the right to revoke in his discretion, conferred upon the Secretary of the Interior by the Act of 1901, means only the right to revoke for cause. This alone is enough to demonstrate that the regulations and the use agreement, purporting to reserve a right to revoke at any time with or without cause, are invalid.

## **POINT VI.**

### **The Government is not entitled to an accounting.**

If the Court should hold that the Government is entitled to an injunction prohibiting the defendant from occupying or using the land involved in this action, it would necessarily follow that the Government might impose taxes or other charges as a condition of permitting the defendant to continue in possession. It may be also that the Government would be entitled to recover damages if any have been caused by the use and occupation of its land prior to the entry of the decree. We con-

tend, however, that the Government has no power to fix *ex parte* the amount to be paid. The damages or charges would have to be determined judicially in accordance with the actual facts. There was no regulation imposing any such charges at the time of the construction of the reservoir and pipe line by the defendant, and no theory on which it can be claimed that the defendant has agreed to submit itself to the regulations or to pay the charges fixed by the Secretary.

The record in this case, however, presents difficulties in the way of a recovery by the Government of any damages in this action. After the defendant had filed its amended answer, the Government moved on the pleadings for a final decree, and this motion was granted. The Government did not ask for an interlocutory decree referring the matter of damages to a Master, and did not ask the Court to ascertain or compute the damages. The Government's motion as made was granted *in toto* and it is hard to see how the Government can now be heard to complain that it did not ask for something more.

### **POINT VII.**

**The decree should be reversed, and the bill of complaint should be dismissed.**

Respectfully submitted,

GRAHAM SUMNER,

WILLIAM V. HODGES,

Counsel for Utah Power & Light  
Company.



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# Supreme Court of the United States.

OCTOBER TERM, 1915.

UTAH POWER & LIGHT COM-  
PANY,

Appellant,

AGAINST

THE UNITED STATES,  
Appellee.

No. 572.

THE UNITED STATES,  
Appellant,

AGAINST

UTAH POWER & LIGHT COM-  
PANY,

Appellee.

No. 573.

## **BRIEF FOR UTAH POWER & LIGHT COMPANY.**

### **Statement.**

These are cross-appeals from a decree of the District Court of the United States for the District of Utah, dated the 4th day of March, 1915, which enjoins the defendant, the Utah Power & Light Company, from maintaining and operating its reservoir, pipe lines, conduits, telephone lines, transmission line, tramway and buildings upon land belonging to the United States located in the County

of Utah and State of Utah. The defendant complains of the decree in so far as it enjoins or in any way interferes with the maintenance or operation of the structures mentioned, and the plaintiff complains of the decree because it does not require the defendant to account and pay for the use of the land as prayed for in the bill of complaint (fols. 56-71).

The decree was entered upon a motion to strike the answer of the defendant and for a decree, upon the ground that the answer was insufficient in law to constitute a defense to the cause of action set forth in the bill of complaint, and is based solely upon the bill of complaint and the answer (fols. 55-57). The facts appear from the allegations in the bill of complaint which are not denied by the answer, and from the allegations of the answer which, for the purposes of this appeal, must be assumed to be true.

The action was commenced June 5, 1912, against The Telluride Power Company, a corporation of the State of Colorado, but before the entry of the decree the Utah Power & Light Company, as its successor in interest, was substituted as a party defendant (fols. 1 and 9-14). On February 3, 1913, the defendant moved to dismiss the bill of complaint, or to strike therefrom certain portions thereof. This motion was sustained in so far as "conduits", "reservoir" and "steel pressure pipe" were concerned, but denied as to the other portions of the bill of complaint (fols. 14-23). The District Court held, in disposing of this motion, that the defendant had acquired rights of way for the reservoir, pipe lines and conduits upon the land of the plaintiff under the local laws, customs and decisions of courts which had been acknowledged an

recognized by Section 9 of the Act of Congress of July 16, 1866 (fols. 24-27).

Subsequently and after the decision of the Circuit Court of Appeals for the Eighth Circuit in United States against Utah Power & Light Company (209 Fed. Rep. 554), a different but somewhat similar action involving some of the same questions, the plaintiff moved to amend its bill of complaint by reinstating therein the portions stricken therefrom by the District Court, and this motion was sustained (fols. 28, 29). Thereupon the defendant filed an amended answer to the original and supplemental bill of complaint, denying some of the allegations thereof and alleging many new facts (fols. 31-54).

The structures in question upon the land of the United States were portions of certain hydro-electric power works, which had been constructed and operated by the defendant and its predecessor since about the first day of December, 1906. The reservoir, pipe lines and conduits were used in storing and conveying water to a power house located upon land of the defendant and its predecessor at which the electric energy acquired by the falling water was by certain water motors, electric generators and other machinery transmuted into electric energy (fols. 2, 32, 47).

The telephone line, tramway and buildings are used in connection with and are necessary for the maintenance, operation and repair of the reservoir, pipe lines and conduits (fol. 49). The transmission line is not on the land of the United States (fol 32).

The said power works have always been used for a public purpose, that is, for the generation of electric energy which has been sold and offered for

sale to the public for the purposes of light, heat and power, and the water which has been stored and conveyed by means of the reservoir, pipe lines and conduits has been used for the purpose of propelling machinery upon land of the defendant and its predecessor, and has always been applied to a beneficial use (fols. 5, 47, 48). The defendant is and its predecessor was a public service corporation, duly authorized to carry on the business of generating and selling electric energy in the states of Utah and Idaho, subject to the laws and regulations of said states (fols. 2, 5, 9, 10, 31, 52). The defendant owns and operates an extensive system, consisting of a number of power plants and about 1,487 miles of transmission and distribution lines. Some of the power plants are operated by water power and others by steam power. They have a combined capacity of 135,250 horse power, and an annual output of more than 200,000,000 kilowatt hours. The system connects with 72 cities and towns which have a combined population of 193,190 people. The power works affected by this action are an indispensable part of the system, and the continued operation thereof is necessary for the maintenance by the defendant of uninterrupted service to its customers (fol. 52).

No formal permission for the construction or operation of the reservoir, pipe lines, conduits, telephone line, tramway or buildings was ever granted to the defendant or its predecessor by the Secretary of Interior or the Secretary of Agriculture (fols. 4, 32). At the time of the construction of the power works the land in question was unoccupied and wild; it was not appropriated or reserved for any purpose and was open to entry and settlement under the various Acts of Congress. On July



1, 1910, the President issued a proclamation purporting to make this land a part of the Wasatch National Forest (fol. 2).

The bill of complaint charges that the defendant's appropriation of the land is a purpresture and a continuing trespass, and that the operation of the power works is a public nuisance and prays that the defendant be enjoined from further operating the said power works, "without the permission of the plaintiff," and from further maintaining its possession and occupancy within the Wasatch National Forest "without the permission of plaintiff and without first complying with the laws of the United States and the rules and regulations promulgated by the Secretary of Agriculture relating to national forests," and prays that the reasonable value of the enjoyment of such land, "to be gauged by the duration of such enjoyment, the net power capacity of the said works, and the scale of charges adopted in the existing regulations of the Secretary of Agriculture governing similar cases", may be duly ascertained, and that the defendant may be compelled to account and pay therefor (fols. 7-8).

The injunction contained in the decree of the District Court is perpetual, unconditional and unqualified, and has the effect of destroying the investment of the defendant and its predecessor in the construction of the power works in question.

The amended answer shows the history of the use of land of the United States for the purpose of appropriating, storing and conveying water, the practice and customs of the appropriators and settlers since the creation of the territory of Utah, the recognition thereof and acquiescence therein by the United States through Acts of Congress and regulations and rulings and decisions of the Secretary

of the Interior, that such use of water and the land of the United States was essential to the development and settlement of the territory, that the acts of the defendant's predecessor in constructing the reservoir and pipe lines upon the land of the plaintiff without the permission of the Secretary of the Interior or the Secretary of Agriculture, was sanctioned by the local customs, laws and decisions of courts, and by the Acts of Congress, and the regulations, rulings and decisions of the Secretary of the Interior and the prevailing practice of the various departments of the United States Government; that the said reservoir and pipe lines were constructed at great expense with the knowledge of the United States and without any protest or objection from the United States; that the land in question was of no substantial value, and that the United States has not been damaged (fols. 35-52).

The defendant contends:

1. The land of the United States within a State, which is not used or needed for any governmental purpose of the United States, is subject to the power of eminent domain of the State.
2. The land of the United States involved in this action was not and is not used or needed for any governmental purpose of the United States.
3. The State of Utah has authorized the defendant and its predecessor to use the land of the United States involved in this action for the public purpose of generating and selling electric energy.
4. The various Acts of Congress recognize that the land of the United States is subject to the local law, and that rights of way thereon for the storage

and conveyance of water can be acquired without the permission of the Secretary of the Interior.

5. The defendant and its predecessor have not violated any lawful regulation of the Secretary of the Interior or the Secretary of Agriculture respecting the use of a right of way for the storage and conveyance of water and have the right under the Acts of 1901 and 1905 to maintain and operate their structures upon the land of the United States.

6. The plaintiff is estopped in equity to enjoin or otherwise interfere with the maintenance or operation of the structures of the defendant involved in this action.

7. The decree appealed from should be reversed and the bill of complaint should be dismissed.

This appeal is taken from the District Court direct to the Supreme Court under Section 238 of the Judiciary Act upon the ground that this case "involves the construction or application of the Constitution of the United States," to-wit, Section 3 of Article IV and the Tenth Amendment, the further ground that in this case "the constitutionality of a law of the United States \* \* \* is drawn in question", to-wit, the Acts of Congress of 1896 and 1901, if interpreted as contended by the Government, and the further ground that in this case "the law of a state is claimed to be in contravention of the Constitution of the United States", to-wit, the laws of the State of Utah authorizing the appropriation of water and the condemnation of public land for the construction of reservoirs, canals, etc., for the storage and conveyance of water for any public purpose (fols. 53-54).

The right of the defendant to appeal direct to the Supreme Court is fully sustained.

*Loeb v. Columbia Trustees*, 179 U. S. 472;

*Hughley Mfg. Co. v. Guleton Cotton Mills*, 184 U. S. 290;

*Spreckles Sugar Ref. Co. v. McLain*, 192 U. S. 397.

### POINT I.

**The land of the United States within a State, which is not used or needed for any Governmental purpose of the United States, is subject to the power of eminent domain of the State.**

The primary function of the Federal Constitution was to create a union of independent sovereign states. It created a new sovereignty and conferred upon it certain limited and enumerated powers. The tenth amendment provided specifically—

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States, respectively, or to the people.”

Each state of the Union is an independent sovereign and has all the rights and powers of a sovereign, except as they may be restricted or limited by the Federal Constitution. The government of the United States is one of “delegated, limited and enumerated powers”.

The sovereign rights and powers of the States newly admitted to the Union are the same as, and are no greater and no less than, those of the original

Thirteen States. No provisions in the Enabling Acts under which such states are admitted can have the effect of limiting or restricting their sovereign powers. Any provision which purported to do so would be void.

*United States v. Harris*, 106 U. S. 629, 635;

*Kansas v. Colorado*, 206 U. S. 46, 87.

*McGilvray v. Ross*, 215 U. S. 70;

*Coyle v. Oklahoma*, 221 U. S. 559;

*Scott v. Lattig*, 227 U. S. 229.

In *Coyle v. Oklahoma*, *supra*, this Court said at page 567:

"This Union was and is a Union of states equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."

and again at page 573:

"The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."

The power of eminent domain is an attribute of sovereignty. Each State, because it is a sovereign has the right and power to take and use property for a public purpose upon payment of just compensation, and the United States, because it is a

sovereign, has the same right and power for any purpose which the United States is by the Federal Constitution authorized to accomplish. This power is a means or instrument which a sovereign can use for the accomplishment of any purpose within its powers.

*Kohl v. U. S.*, 91 U. S. 367;

*Boom Co. v. Patterson*, 98 U. S. 403.

*Luxton v. North River Bridge Co.*, 153 U. S. 525.

By force of the tenth amendment of the Federal Constitution, the State has the power of eminent domain with respect to the land of the United States, as well as that of any other proprietor, unless such power is "delegated" to the United States, or "prohibited" to the State by the Federal Constitution. The only clause of the Constitution which could have any such effect is Section 3 of Article IV which provides:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States or of any particular state."

Does this clause "delegate" to the United States the power of eminent domain of the States or "prohibit" the States from exercising that power with respect to the land of the United States? Are the powers thereby conferred upon Congress exclusive of the State's power of eminent domain? Does this clause confer upon the United States with respect to its land within a State, any sovereign or governmental powers or any rights



or powers which are different from those of other proprietors of similar land within the same State?

### A.

THE RIGHTS AND POWERS OF THE UNITED STATES AS THE OWNER OF LAND WITHIN A STATE, WHICH IS NOT USED OR NEEDED FOR A GOVERNMENTAL PURPOSE, ARE THE SAME AS THOSE OF OTHER OWNERS OF SIMILAR LAND WITHIN THE SAME STATE.

Section 3 of Article IV of the Federal Constitution should not be treated as a "delegation" of powers by the States to the United States. The United States as the owner of territory or other property would necessarily have the right and power to dispose of it and to make rules and regulations respecting it. Such rights and powers are attributes of ownership. This clause, however, has the effect of designating Congress as the branch of the Federal Government which is to exercise the rights and powers possessed by the United States as incidents of the ownership of property. It is the function of the Federal Constitution to define the powers of the separate branches of the Federal Government, as well as the powers of the Government as a whole.

In *Butte City Water Co. v. Baker*, 196 U. S. 119, the Supreme Court, after quoting Section 3 of Article IV of the Constitution, said:

"In other words, Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of. *The Nation is an owner, and has made Congress the principal agent to dispose of its property.* \* \* \* While the disposition of these lands is provided for by Congressional legislation, such legislation savors

somewhat of *mere rules prescribed by an owner of property for its disposal*. It is not of a legislative character in the highest sense of the term, and as an *owner may delegate to his principal agent* the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands."

The first part of Section 3 of Article IV provides:

"Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress."

Paragraph 17 of Section 8 of Article I confers upon Congress power

"to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of Congress become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dockyards and other needful buildings".

These clauses show unmistakably an intention to protect the sovereign powers of the states from interference by the Federal Government. Congress has no power to exercise *exclusive* legislation within a state unless that state consents, and even the seat

of the Federal Government is limited to a district ten miles square.

There is nothing in the Constitution to indicate that the United States, as the owner of land within a state, is to have any rights or powers which are different from those of other owners of similar land within the same state. There is no attempt to define the rights or powers of the United States as an owner of land or to confer upon Congress the power to define or create rules or laws of property affecting the land of the United States. The powers conferred by Section 3 of Article IV extend only to the *property* of the United States and cannot conceivably include any powers or rights other than those which are incidents of ownership of the property. These rights and powers must be defined and their nature and scope determined by the general law of the state within which the land is located.

It is fundamental that all legal questions affecting land and the rights and powers of owners of land are governed and determined by the law of the State in which the land is located. There is no Federal common law of real property.

*Derby v. Jaques*, 7 Fed. Cas. 521, p. 526.

*Burgess v. Seligman*, 107 U. S. 20, p. 33.

*Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, p. 583.

*Amy v. Watertown*, 130 U. S. 301.

*Hartford Ins. Co. v. Chicago, etc., R. R. Co.*, 175 U. S. 91.

*Clark v. Clark*, 178 U. S. 186.

*Thompson v. Fairbanks*, 196 U. S. 516.

It may be that the States have no power to *change* the law of real property in so far as it relates to the land of the United States or to destroy or impair its rights or powers as an owner

(except through its power of eminent domain), but certainly the States have power to determine what the common law of real property is, tracing its origin to the territorial days when the United States had entire control over the adoption and development of the common law. We contend that the land of the United States must be and is subject to this common law, which originated in the territory and later became the law of the States; and we further contend that the United States has no power to change this common law after the creation of the State.

To hold that the United States has the power to define its rights and powers as an owner of land within a state, although the state has the power to define the rights and powers of other owners of similar land within the same state, would create a condition of chaos. For the sake of orderly government there must be one, and only one, source of the power to define by law the rights and powers which are incident to ownership of land.

For instance, in some states the eastern doctrine of riparian rights and in others the western doctrine of appropriation applies to land bordering on flowing water. These two doctrines are antagonistic to each other and cannot both exist in the same jurisdiction.

*Schodde v. Twin Falls Water Co.*, 224 U. S. 107.

*Snyder v. Colorado Gold Dredging Co.*,  
181 Fed. Rep. 63 (C. C. A., 8th Circ.).

Is it conceivable that Congress could declare for land of the United States bordering on flowing water within a state riparian rights recognized by the eastern doctrine, while the state declared that other owners of land bordering on the same water

had the rights of appropriation recognized by the western doctrine? What would be the result if an upper riparian proprietor appropriated and diverted water from the stream as authorized by the law of the state and the United States as a lower riparian proprietor attempted to prevent him from so doing upon the ground that it claimed the right to have the water flow as it was wont to flow? By what law would such a controversy be determined?

It must be that land of the United States within a state, which is not used or needed for a governmental purpose, is subject to the jurisdiction, powers and laws of the State in the same manner and to the same extent as similar land of others.

*Broder v. Natoma Water Co.*, 101 U. S. 274.

*Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525.

*Chicago, R. I. & P. Ry. Co. v. McGlinn*, 114 U. S. 542.

*Ward v. Race Horse*, 163 U. S. 504.

*Camfield v. U. S.*, 167 U. S. 518.

*Kansas v. Colorado* 206 U. S. 46.

*McGilveray v. Ross*, 215 U. S. 70.

*People v. Shearer*, 30 Cal. 658.

*Woodruff v. North Bloomfield, Etc., Co.*, 18 Fed. Rep. 753.

In *Broder v. Natoma Water Co.*, *supra*, it was held that without any Act of Congress rights of way for canals and reservoirs could be acquired upon the public land in the State of California in accordance with the local customs, laws and decisions of the Courts of that State.

In *Chicago, R. I. & P. Ry. Co. v. McGlinn*, *supra*, this Court said, with reference to land of the United States (p. 547) :

"The government of the State of Kansas extended over the Reservation, and its legislation was operative therein, except so far as the use of the land as an instrumentality of the general government may have excepted it from such legislation. In other respects, the law of the State prevailed."

In *Fort Leavenworth R. R. Co. v. Lowe*, *supra*, it was said by this Court, at page 526 :

"The land constituting the Reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the State of Kansas, and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. \* \* \* But in 1861 Kansas was admitted into the Union upon an equal footing with the original States, that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States. \* \* \* The United States, therefore, retained, after the admission of the State, only the rights of an ordinary proprietor; except as an instrument for the execution of the powers of the general government, that part of the tract, which was actually used for a fort or military post, was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. So far as the land constituting the Reservation was not used for military purposes, the possession of the United States was only that of an individual proprietor. The State could have exercised, with reference to it, the same authority and jurisdiction which she could have exercised over similar property held by private parties."

In *Ward v. Race Horse*, *supra*, it was held that the State of Wyoming had power to regulate the killing of game upon land of the United States in the same manner and to the same extent as upon other land, and the conviction of the defendant for killing game upon said land in violation of such State law was sustained. This Court here referred to the land as "belonging to the United States as a private owner."

In *Kansas v. Colorado*, *supra*, it was held that the United States had no interest or right to intervene in the controversy between the two States which involved the right of residents of Colorado to appropriate the waters of the Arkansas River, even though that river flowed to a considerable extent over lands of the United States. This Court, after quoting Section 3 of Article IV said, at page 89:

"The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words 'territory or other property'. It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. \* \* \* *But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.* Appreciating the force of this, counsel for the Government relies upon 'the doctrine of sovereign and inherent power,' adding 'I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference.' His argument runs substantially along this line: All legislative power must be vested in either the state or the National Government; no legislative powers belong to a state government



other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. *This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted.* With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act."

And at page 90 :

"The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of

further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

And at page 91:

"This very matter of the reclamation of arid lands illustrates this: At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the State, in which any particular tract of such land was to be found, and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted none can be exercised.

It does not follow from this that the National Government is entirely powerless in respect to this matter. These arid lands are largely within the Territories, and over them by virtue of the second paragraph of section 3 of Article IV heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the States, at least of the Western States, the National Gov-

ernment is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. *We do not mean that its legislation can override state laws in respect to the general subject of reclamation.* While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders."

And at page 93:

"But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that *each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.*"

And again at page 94:

"It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State."

We know of no case in which it has been held that the United States, with respect to land within a state, which is not used or needed for a governmental purpose, has any rights or powers which are different from those of other owners of similar land within the same state.

In *Camfield v. U. S.*, 167 U. S. 518, and *Light v.*

*U. S.*, 220 *U. S.* 537, it was held that the United States, with respect to land within a state, had "the rights of an ordinary proprietor", such as the right "to maintain its possession and prosecute trespasses", and that it could enforce by criminal prosecution rules and regulations made for the protection of its rights of property. The power to *enforce* its rules and regulations by fine and imprisonment is not conferred by Section 3 of Article IV, which merely speaks of power to *make* rules and regulations. The power to *enforce* its rules and regulations belongs to the United States because it is a sovereign, and as such has power to create and use the machinery of the criminal law for the purpose of enforcing its laws. These cases merely show that the United States has the power to employ the means and methods of a sovereign in protecting its rights of property. They do not hold or suggest that the rights of property to be protected are any different from those of other owners.

## B.

SECTION 3 OF ARTICLE IV OF THE FEDERAL CONSTITUTION IS NOT INCONSISTENT WITH OR EXCLUSIVE OF, AND DOES NOT PROHIBIT, THE POWER OF EMINENT DOMAIN OF THE STATES, WITH RESPECT TO LAND OF THE UNITED STATES.

It seems clear that a grant of power to dispose of property is not exclusive unless it is so expressed or the circumstances indicate that such was the intention of the grantor. The owner of property may give a power of sale to an agent without impairing his own power of sale, and to a second agent without impairing the power of the first agent. There is no inference that the grant of such a power is exclusive.

The same principle must be applied in interpreting the Federal Constitution. The grant of a power to Congress should not be held to exclude or impair the sovereign powers of the States, unless it is so expressed or the circumstances show that such was the intention.

It is claimed that the power to dispose of the territory or other property of the United States conferred by Section 3 of Article IV is inconsistent with and exclusive of power in the states to take such property for a public purpose. We cannot follow the argument. The law of every state declares that every owner has power to dispose of his property, including power to fix the terms and conditions on which and the purposes for which, others may use it, but nobody has ever suggested that this power is inconsistent with the state's power of eminent domain. The exercise of the power of eminent domain does not *prevent* an owner from disposing of his property, but it *compels* him to dispose of it for a public purpose and insures the payment of just compensation therefor.

The language of the Constitution, when conferring upon Congress power "to exercise *exclusive* legislation" over the seat of the Government and certain other places, is in striking contrast to that conferring power "to dispose of and make all needful rules and regulations respecting" the *property* of the United States. The former confers sovereign powers, including the power of government, and they are expressed as *exclusive* of the sovereign powers of the states. The latter purports to deal only with *property* and *rights of property*. It confers no sovereign power, no power of government and no power expressed or intended to be *exclusive* of the sovereign powers of the states. This is

made clear by the express provision that nothing in the Constitution "shall be so construed as to prejudice any claims \* \* \* of any particular state".

If Section 3 of Article IV is consistent with and does not exclude or prohibit the power of the states "to make rules and regulations," *i. e.*, to legislate, with respect to land of the United States, as was held by this Court in *Ward v. Race Horse*, *supra*, why should it be held to exclude or prohibit the sovereign power of the State "to dispose of" such land, *i. e.*, take it for a public purpose?

Does the power to *dispose* of the land of the United States include the power to *retain* such land, which is not used or needed for a governmental purpose of the United States, against the claim of the state that it is needed for a public purpose? It must be apparent that an affirmative answer is not *required* by the language of Section 3 of Article IV. We submit that a negative answer is *required* by the well settled principle that the United States has no power to interfere with the governmental operations of the states, any more than the States have to interfere with the governmental operations of the United States. This lies at the very root of constitutional interpretation. It has been recognized from the earliest days as essential to the protection of the sovereign powers of the United States and the several states. It is indispensable to the maintenance of the dual system of government established by the Constitution.

*McCulloch v. Maryland*, 4 Wheat. 316.

*Withers v. Buckley*, 20 How. 84.

*Texas v. White*, 7 Wall. 700.

*Collector v. Day*, 11 Wall. 113.

*Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429.

*South Carolina v. U. S.*, 199 U. S. 437.

In *M'Culloch v. Maryland* (*supra*) it was held that a state had no power to tax the operations of a national bank.

In *Texas v. White* (*supra*), it was held that Congress had no power to tax the operations of a state bank. The Court said, at page 725:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

In *The Collector v. Day* (*supra*), it was held that Congress had no power to tax the salary of a judicial officer of a State. The Court said, at page 127:

"It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the



mercy of that government. Of what avail are these means if another power may tax them at discretion?"

It is held by these cases that the power of taxation conferred by the Constitution upon Congress is subject to an implied limitation (no such limitation being expressed) that Congress cannot tax the governmental operations of the States. By similar reasoning it follows that the power "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States" should be subject to the proviso that Congress cannot so exercise the power as to interfere with the power of eminent domain of the States.

It is well settled that when a new State is admitted to the Union the title to land under navigable water, which previously belonged to the United States, passes by implication, without any express grant, to the new State. This follows because ownership of such land is an attribute of sovereignty and the new State must be on an equal footing with the other states.

*McGilvray v. Ross*, 215 U. S. 70.

*Scott v. Lattig*, 227 U. S. 229.

If title to land of the United States is to pass by implication in order to preserve the sovereign powers of the states, why is not the power to control and dispose of that land subject to the power of eminent domain of the states?

That the power of eminent domain is a sovereign power and the exercise thereof a governmental operation cannot be doubted. It is hard to conceive of any power of sovereignty which is of greater importance or dignity. We fail to see any ground for

claiming that the United States, for the protection of *merely proprietary interests* can interfere with the power and duty of a state to make internal improvements which it determines are necessary in the interests of the public. Nor do we see how the taking of land, which is not used or needed for a governmental purpose, can interfere with any governmental operation of the United States. In these cases there is no issue or conflict between the sovereign powers of the United States and the sovereign powers of a state. The only issue or conflict is between the *merely proprietary interests* of the United States and the *sovereign powers* of a state, and it seems clear that the sovereign powers of the state must prevail.

The distinction between property of a state or municipal corporation (the agent of a state) which is used or needed for a governmental purpose and that which is not so used or needed has been long recognized and is well established. For instance, it is held that property of a municipality which is not so used or needed may be taken and sold on execution.

*Klein v. New Orleans*, 99 U. S. 149;

*Merryweather v. Garrett*, 102 U. S. 472;

*New Orleans v. Morris*, 105 U. S. 600;

*New Orleans v. Louisiana, etc., Co.* 140 U. S. 654;

*Werlien v. New Orleans*, 177 U. S. 390;

*Darlington v. Mayor*, 31 N. Y. 164;

*Lyon v. City of Elizabeth*, 43 N. J. Law, 149;

*Murphy v. Mobile*, 108 Ala. 663;

*State v. Buckles*, 8 Ind. App. 282;

*Laredo v. Benavides*, 25 S. W. Rep. 482.

In *Klein v. New Orleans, supra*, this Court said:

"Municipal corporations are the local agencies of the government creating them, and their powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powers become part of the machinery of government, and to permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself.

\* \* \* \*

*The test in such cases is as to the necessity of the property for the due exercise of the functions of the municipality."*

In *Werlein v. New Orleans, supra*, this Court said at page 403:

"So we see that whatever property a municipal corporation holds, it holds it in trust for its inhabitants, in other words, for the public, and the only difference in the trust existing in the case of a public highway or a public square, and other cases, is that in the one case the property cannot be taken in execution against the city, while in other cases it may be. The right of the city is less absolute in the one case than in the other, but it owns all the property in the same capacity and character as a corporation, and in trust for the inhabitants thereof. Views similar to these have been heretofore substantially expressed by the late Judge Denio, in speaking for the Court of Appeals of New York in *Darlington v. Mayor*, 31 N. Y. 164.

From these considerations we are of opinion that there is no difference in the character of the title by which a municipal corporation holds these two classes of property, but there is simply a difference in the power which such corporation can exercise over its property in the two cases. That difference arises from the peculiar nature of the use of the property, which in the one case requires it to be in-

alienable and not liable for the debts of the city, while in the other case it is open both to alienation and to sale under execution. In each case the character or capacity in which the city in fact holds the title is the same."

The United States has power to tax property of a State which is not used or needed for a governmental purpose although it cannot tax property which is so used or needed.

*South Carolina v. U. S.*, 199 U. S. 437.

In this case the Court recognized the principle that the United States had no power to interfere with the Governmental operations of the States, but held that this applied only to those operations which were "the ordinary functions of Government", and pointed out the distinction between the Governmental functions of a State or other municipal corporation, and acts of "what might be called a private nature, although enuring of course ultimately to the benefit of the public."

In the exercise of its governmental functions, a state or municipal corporation is not liable for negligence in the absence of statute, but in conducting a business or managing property not governmental in its nature, they are liable for negligence as would be a private corporation.

*Lloyd v. Mayor*, 5 N. Y. 369;

*Maximillan v. Mayor*, 62 N. Y. 160;

*Brown v. Vinal Haven*, 65 Maine, 402;

*Mead v. City of New Haven*, 40 Conn. 72;

*City of Petersburg v. Applegarth, Admr.*, 28 Grattan, 321;

*Eastman v. Meredith*, 36 N. H. 285;

*Western Savings Fund Society v. Philadelphia*, 31 Pa. St. 175;

*Oliver v. Worcester*, 102 Mass. 489.

We know of no reason why the same distinction should not be applied to the United States and to land which it owns within a state. If the taxing or taking on execution of property of a state or municipality, which is not used or needed for a governmental purpose, is not an interference with its governmental operations, how is the taking of similar property of the United States under the power of eminent domain an interference with its governmental operations?

It is said that the United States cannot hold property as a monarch may for private or personal uses. This may be true, but it is also true that no state or municipal corporation can hold property as a monarch may for private or personal uses. There is no place in our political institutions for a private fortune of a state or the United States similar to that of a king or an emperor; but this does not prevent or exclude a distinction between property which is used or needed for a governmental purpose and that which is not.

It is claimed that the United States holds its land *in trust* for the people of the whole country, and that the States have no power to interfere with the administration of this trust. But it is surely a loose figure of speech to say that the land of the United States is held *in trust*. What are the terms of the trust? There is nothing in the Constitution to show the purposes for which such land is to be held or used except Section 3 of Article IV, which gives to Congress the power to dispose of it and in the meantime to make all needful rules and regulations respecting it. This makes the *disposition* of the land the purpose for which it is held. The making of rules and regulations is a *responsibility*, not a *benefit*, for the United States, and cannot be re-

garded as a *purpose* for which the land is held. The United States holds its land *in trust*, only in the sense that a State or municipality holds all its property *in trust* for the public.

The real purpose for which the United States acquired the public land was to encourage the settlement, growth and development of the country and ultimately to create new states and thus add to the strength of the Union. The territorial status was necessarily a temporary one. The ultimate object was the creation of new states and the transfer to them of the power and responsibility of government.

How can the State discharge its responsibility of government unless it has the power to take and use land of the United States for necessary public purposes? How is the exercise of that power inconsistent with any purpose for which the land is held, when the very object of the power is to improve and develop the country and stimulate its growth and settlement? How can Congress discharge this responsibility within a State, where its powers are limited to those enumerated in the Constitution?

Truly, the question whether the use of any particular land is necessary for some public purpose is essentially a local one to be determined by the States, and their decision should be final unless Congress determines that the use of the same land is necessary for some governmental purpose of the United States.

*Clark v. Nash*, 198 U. S. 361.

*Spickly v. Highland, etc., Co.*, 200 U. S. 527.

*Offield v. N. Y., N. H. & H. R. Co.*, 203 U. S. 372.

It must be clear that the United States has power to *use* land only for the purpose of carrying out some substantive power conferred by the Constitution, *i. e.*, for some governmental purpose. Although it is said that the United States has the rights of an ordinary proprietor, it must be clear that its power to use land is limited. The use of land involves the expenditure of money. The United States cannot raise or spend money for any purpose except those authorized by the Constitution. It will not be claimed that because it owns land which is suitable for mining it can engage in the mining business, or because it owns land which is suitable for agriculture it can engage in the farming business, or that because it owns land which is suitable for the development of power it can engage in the power business.

While conceivably the United States might engage in any such business if it were deemed desirable in order to accomplish some Governmental purpose, its power so to do would not depend upon its ownership of land. If it needed for any such purpose the land of others, it could acquire it by condemnation. The test for determining the purposes for which the United States can *use* its land, must be the same as that for determining the purposes for which it can *acquire* by condemnation the land of others, the test in each case being whether the purpose to be accomplished is within the substantive powers delegated to Congress by the Constitution or governmental in its nature. The nature and extent of sovereign powers do not depend upon any question of *title* to property.

Why should it be claimed or held that the United States has power to retain land which it does not use or need for any Governmental purpose against



the claim of the State that it is necessary for some public purpose of the State? The mere *holding* of such land cannot be regarded as a Governmental function or as one of the purposes for which the United States was created. Its power to hold and dispose of land is not a "substantive" or "independent" power, but rather an incidental power or means for carrying out the substantive powers, like the power of eminent domain, power to create corporations, etc.

*Luxton v. North River Bridge Co.*, 153 U. S. 525.

It may be argued that although the United States does not need the land now, it may need it for some Governmental purpose at some time in the future, and that it should be permitted to retain the land indefinitely because of this *possible* need. But the answer is, that even though the State takes the land and uses it for some public purpose, the United States always has the power to take it back through its power of eminent domain, if at any time it needs the land for a Governmental purpose, and why should all use of the land be prohibited in the meantime?

It may be argued that the United States has power to determine to whom and for what purposes it will dispose of its land, and that it may prefer to dispose of it to farmers, miners or other settlers rather than for some public purpose. But as soon as the United States has disposed of its land to *anybody*, for *any purpose* it necessarily becomes subject to the power of eminent domain of the state and may be taken and used for any public purpose upon payment of compensation to the owner at that time. It seems foolish to say that the power

of disposition is superior to the power of eminent domain when the exercise of the former necessarily makes the land subject to the latter.

The Government may claim that there is no danger that Congress will prevent the use of its land for any necessary public purpose, and that the people of the State are justified in relying upon the wisdom of Congress as upon that of their own legislatures to promote the public interests of the State. But this very action is in substance an attempt by the United States to prevent the land from being used for a necessary public purpose. The decree from which this appeal is taken enjoins perpetually and without qualification the use of the land for a purpose admitted to be necessary for the public interests, and there is no claim that any other use would be better or more desirable.

The idea that there must be concurrent action on the part of the United States and the State in order to bring about an intrastate public improvement is contrary to the spirit of the Constitution which contemplates a division, not a conflict, of sovereign powers. Suppose, for instance, that it were desirable to construct an intrastate railroad or other public improvement, partly upon land of the United States and partly upon land of individuals. Congress could not accomplish the improvement without the consent of the individual owners because it could not condemn their property for such a purpose and if the Government's position be right, the state could not accomplish the improvement without the consent of Congress.

The Government relies upon decisions to the effect that the States have no power to tax the land

of the United States, but these are not controlling of the present question.

*Van Brocklin v. Tennessee*, 117 U. S. 151.

*Wisconsin, etc., Ry. v. Price County*, 133 U. S. 496.

*South Carolina v. U. S.*, 199 U. S. 437.

In *Van Brocklin v. Tennessee* (*supra*), it was held that a State had no power to tax land of the United States which had been acquired at a judicial sale for non-payment of Federal taxes. With reference to the question whether the land of the United States was subject to the power of eminent domain of the State, the Court said—

“When that question shall be brought into judgment here, it will require and will receive the careful consideration of the court”,

clearly recognizing that in holding that the land of the United States was not subject to taxation by the State, the Court did not dispose of the question whether such land was subject to the power of eminent domain of the State.

In *Wisconsin Central R. R. Co. v. Price County* (*supra*), the Court said, at page 504:

“It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from state taxation—and by state taxation we mean any taxation by authority of the State, whether it be strictly for state purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency.”

There is a clear and important distinction between the power to tax and the power of eminent domain. The former has always been regarded as a power to destroy, because it involves the taking of property from the person taxed without the return of any tangible equivalent. The power of eminent domain, however, is clearly not a power to destroy. It involves the taking of property from the owner, but only upon the return to him of the fair equivalent in money.

There is another distinction between the power to tax and the power of eminent domain. The power to tax specific property is not so essential to the public interest that the sovereign cannot waive or contract not to exercise it. It is well settled that a State may for some real or supposed benefit to the public exempt property from taxation, and that its contract not to tax such property is valid. In sustaining these agreements, the courts distinguish between contracts of a State affecting political rights or obligations and those affecting only property rights, and hold that an agreement not to tax specific property is one which affects only property rights.

*Stearns v. Minnesota*, 179 U. S. 244.

Would anybody claim that a contract by a State not to exercise its power of eminent domain with respect to particular property was valid? Does such a contract relate only to rights of property or does it affect the political rights and obligations of the State? There can be no doubt that it falls within the latter class. It prevents the state from carrying out its obligation to guard and promote the interests of the public.

The inability of a state to tax land of the United

States is not a substantial impairment of its sovereign powers. It merely means that the expenses of the state government must be carried by its own citizens without contribution from the national Government. On the other hand, the inability of a state to take land of the United States for a public purpose would be a serious impairment of its sovereign powers, while its ability so to do would not interfere to any extent with the sovereign powers of the United States, unless the land were used or needed for a governmental purpose. There is a difference between losing property through taxation and selling it for full value.

### C.

THE AUTHORITIES SUSTAIN THE POWER OF EMINENT DOMAIN OF THE STATE WITH RESPECT TO LAND OF THE UNITED STATES, WHICH IS NOT USED OR NEEDED FOR A GOVERNMENTAL PURPOSE.

The question, whether land of the United States is subject to the power of eminent domain of the States, has never been decided by this court. It was considered, however, in an early case. In this, as in every other case in which the question has been presented, the Court expressed the opinion that such land, if not used or needed for a governmental purpose of the United States, is subject to the power of eminent domain of the States.

*United States v. City of Chicago*, 7 How. 185.

*United States v. Railroad Bridge Co.*, 6 McLean, 517; 27 Fed. Cas. 686 (C. C. Ill. 1855).

*U. P. R. Co. v. B. & M. R. Co.*, 3 Fed. Rep. 106 (C. C. Neb. 1880).

*Illinois Central R. R. Co. vs. C., B. & N. R. Co.*, 26 Fed. Rep. 477, 478 (C. C. Ill. 1886).

*U. P. R. R. Co. v. Leavenworth, N. & S. Ry. Co.*, 29 Fed. Rep. 728 (C. C. Kan. 1887).

*Jones v. F. C. & P. R. Co.*, 41 Fed. Rep. 70, 72 (C. C. Florida, 1889).

*Camp v. Smith*, 2 Minn. 131.

*State v. Bachelder*, 5 Minn. 178, 180.

*Simonson v. Thompson*, 25 Minn. 450, 453.

*Burt v. Mechanics Ins. Co.*, 106 Mass. 356, 360.

*Lewis on Eminent Domain*, 3rd Ed., Vol. 11, Sec. 414.

In *United States v. City of Chicago*, *supra*, it was held that the City of Chicago had no right to open a street through the Fort Dearborn Military Reservation because it was used for a Governmental purpose of the United States, but this Court said at page 194 :

"It is not questioned that land within a State purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain."

In *United States v. Railroad Bridge Company*, *supra*, the Court refused to enjoin the defendant from constructing its railroad and bridges across property of the United States, holding first that the land was not used for a Governmental purpose, and secondly, that such land was subject to the state's power of eminent domain. The Court said, at page 692 (27 Fed.) :

"The proprietorship of land in a state by the general government, cannot, it would seem, en-

large its sovereignty or restrict the sovereignty of the state. This sovereignty extends to the state limits over the territory of the state subject only to the proprietary right of the lands owned by the federal government, and the right to dispose of such lands and protect them, under such regulations as it may deem proper. The state organizes its territory into counties and townships and regulates its process throughout its limits. And in the discharge of the ordinary functions of sovereignty, a state has a right to provide for intercourse between the citizens commercial and otherwise, in every part of the state, by the establishment of easements, whether they may be common roads, turnpike, plank or railroads. The kind of easement must depend upon the discretion of the legislature. And this power extends as well over the lands owned by the United States, as to those owned by individuals. This power, it is believed, has been exercised by all the states in which the public lands have been situated. It is a power which belongs to the state, and the exercise of which is essential to the prosperity and advancement of the country."

\* \* \* \* \*

"It is difficult to perceive on what principle the mere ownership of land by the general government within a state, should prohibit the exercise of the sovereign power of the state in so important a matter as the easements named. In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it. They encourage population, and increase the value of land. In no respect is the exercise of this power by the state inconsistent with a fair construction of the constitutional power of congress over the public lands. It does not interfere with the disposition of the lands, and instead of lessening enhances their value."

\* \* \* \* \*



"Whether we look to principle, or the structure, of the federal and state governments, or the uniform practice of the new states, there would seem to be no doubt that a state has the power to construct a public road through the public lands. A grant to this effect is sometimes made by congress, as in the act of 1852; but this does not show the necessity of such a grant. Generally, congress appropriates to the road a large amount of lands. The positions are believed to be irrefragable—first, that the right of eminent domain is in the state; and secondly, that the exercise of this right by a state is no where inhibited, expressly or impliedly, in the federal constitution, or in the powers over the public lands by that instrument, in congress."

In *Jones v. F. C. & P. R. Co.*, *supra*, the Court said at page 72:

"Every state has, by virtue of its sovereignty, and right of eminent domain, power to create by the establishment of railroads, easements upon all lands within its limits, unless specially reserved for purposes of the national government, and such easements would interfere with the purpose for which they were reserved. *U. S. v. Bridge Co.*, 6 McLean, 517. So, if the lands were unquestionably the property of the United States, without any interfering equities, the defendant would have the right of way, and an injunction would not lie."

#### D.

THE FAILURE OF CONGRESS TO PROVIDE FOR ACTIONS TO CONDEMN LAND OF THE UNITED STATES DOES NOT AFFECT THE SUBSTANTIVE RIGHT OR POWER OF THE STATES.

It may be claimed that land of the United States cannot be subject to the power of eminent domain

of the States because the Congress has not made provision for actions to condemn such land. But the fact that the United States cannot be sued without its consent does not affect any question of substantive right. It affects merely the remedy. A man who holds an overdue Government bond has a substantive right against the Government, in spite of the fact that he cannot enforce it unless the Government consents to be sued. The refusal of a sovereign to be sued cannot destroy substantive rights.

But surely the United States cannot in this action take advantage of the fact that Congress has not provided for actions to condemn lands of the United States. If the substantive right exists, it is the duty of Congress to provide for such actions, and until provision therefor is made the States or their authorized representatives are justified in taking and using the land for a public purpose, and waiting until the United States makes a claim for compensation.

But, the defendant is not attempting to sue the United States. This is an action in equity, brought by the United States after the defendant has taken possession of and constructed improvements upon the land. The United States has voluntarily submitted to the jurisdiction of the court. The defendant has the right to plead any defense or counterclaim, and has alleged facts showing that it has a substantive right to take and use the land in question. The most that the United States is entitled to recover is damages measured by the reasonable value of the land.

It is well settled that when a public service corporation, having the power of eminent domain, constructs its plant upon the land of another, without condemnation or agreement, but without objec-

tion from the owner, the public service corporation will not be ousted either by ejectment or injunction, the owner's remedy being limited to damages measured by the reasonable value of the land.

*Roberts v. North Pacific R. R. Co.*, 158 U. S. 1.

*Northern Pacific R. R. Co. v. Smith*, 171 U. S. 260.

*Donohue v. R. R. Co.*, 214 U. S. 499.

*Miocene Ditch Co. v. Jacobsen*, 146 Fed. Rep. 680 (C. C. A., 9th Cir.).

*Eastern Ore Co. v. Des Chutes R. R. Co.*, 213 Fed. Rep. 897.

*Kamper v. Chicago*, 215 Fed. Rep. 706 (C. C. A., 7th Cir.)

It is alleged in the amended answer that the hydro-electric power works of the defendant, including the structures upon the land of the United States, "were constructed with the knowledge of the United States" and that "no officer or representative of the United States has, until sometime in 1912 (six years after completion of the works) objected to, or protested against the construction or use of said works \* \* \* or demanded any compensation therefor" (fols. 46-7).

## POINT II.

**The land of the United States involved in this action was not and is not used or needed for any governmental purpose of the United States.**

There is no claim or suggestion that the land involved in this action was, in 1906, at the time of the

construction of the hydro-electric power works of the defendant, used or needed for any Governmental purpose of the United States. It was at that time vacant, unoccupied, unappropriated, land of the United States, not used or reserved for any purpose. It was not until July 1, 1910, that this land was reserved as a part of the Wasatch National Forest. Prior to that date, it was open to entry and settlement under the General Land Laws of the United States.

There is nothing in any act of Congress to indicate that the land involved in this action was needed by the United States for any purpose, governmental or otherwise. The General Land Laws show that the United States did not need or desire to retain its unreserved public lands, but that it desired on the contrary to dispose of them. These laws were all designed to encourage settlers or miners to enter upon, take and use the land, and they all provided that upon complying with certain conditions and paying certain fees, nominal in amount, the entrymen could acquire title to the land. These acts amount to a most emphatic declaration by Congress that the lands of the United States which are not appropriated, reserved or used for any specified purpose, are not needed by the United States, from which it follows, as a necessary conclusion, that the action of a State in taking or using any such land is not an interference with any Governmental operation of the United States.

The bill of complaint is based exclusively upon the property rights of the United States. The essence of the bill is that the land in question belongs to the plaintiff, and that the defendant has no authority or permission from the plaintiff to use it. There is no allegation that the United States desires

to use the land for the development of hydro-electric power or for any other purpose, or that the use of the land by the defendant interferes in any way with any governmental purpose or operation of the United States, or that such use of the land injures or damages any other land or any interest of the United States.

The bill of complaint does, however, allege that the use of the land in question by the defendant will "seriously embarrass the plaintiff in its endeavor to effectuate its settled policies touching the use and enjoyment of the national forests". It is fair to assume that if the land in question had not been reserved as a national forest, this action would never have been brought, and that if the defendant complied now with the rules and regulations of the Secretary of Agriculture relating to national forests and paid the charges based upon the net power capacity of its works as provided in such rules and regulations, the action would be discontinued. In other words, the real purpose of the action is not to stop the use of the land by the defendant for the development of hydro-electric power but rather to compel the defendant to comply with and submit to the rules and regulations of the Secretary of Agriculture (fols. 7-8). The nature and validity of these rules and regulations will be considered later (*post*, pp. 86-90).

We contend that if the land of the United States involved in this action was not used or needed for a governmental purpose at the time of the construction of the reservoir, pipe lines and conduits thereon, the rights of the defendant became vested before the land was reserved as a national forest and could not be prejudiced by such reservation. It may nevertheless be pertinent to consider

whether the reservation of land as a national forest is a governmental purpose or amounts to a withdrawal of such land from the state's power of eminent domain.

While the Congress unquestionably has the power to reserve lands for forestry or other purposes and thus remove them from the operation of the general land laws, there is no clause in the Constitution which confers upon Congress the power to improve or protect the forests of the United States in order to conserve the supply of timber. It would not be claimed that Congress has the power for any such purpose to condemn land belonging to private individuals or corporations or to prevent such individuals or corporations from wasting or destroying the forests upon their own lands.

But the test for determining the purposes for which the United States can withhold land from the operation of the state's power of eminent domain must be the same as for determining the purposes for which the United States can take the land of others in the exercise of its power of eminent domain.

The Act of Congress approved June 4, 1897, under the authority of which the land involved in this action was reserved as a national forest provides (30 Stat. 35) :

"No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States;"

and further provides (page 36) :

"The jurisdiction, both civil and criminal, over persons within such reservations shall not

be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

These provisions of the law show (1) that the purposes of the forest reservation were not such as to withdraw the land from the operation of the state's power of eminent domain; and (2) that Congress did not intend that the reservation of land as a national forest should withdraw it from the jurisdiction, laws or sovereign powers of the states.

It accordingly follows that even at the present time the land involved in this action is not used or needed for any governmental purpose of the United States.

### **POINT III.**

**The State of Utah has authorized the defendant, and its predecessor, to use the land of the United States involved in this action for the public purpose of generating and selling electric energy.**

It is important to consider the laws of the Territory of Utah which were subject to the control of



Congress as well as the laws enacted by the State of Utah after its admission to the Union.

An Act of Congress, approved September 9, 1850, which created the Territory of Utah, provided that the legislative power of the Territory should be vested in the Governor and a legislative assembly, and should extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of said Act of Congress, but that no law should be passed interfering with the primary disposal of the soil; and further provided that all the laws passed by the legislative assembly and Governor should be submitted to the Congress, and that, if disapproved, they should be null and of no effect.

On February 20, 1880, the Territory of Utah enacted a statute which authorized the appropriation of water for any useful purpose and contained the following:

"Sec. 15. All persons shall have the right of way across and upon public, private and corporate lands, or other right of way, for the construction and repair of all necessary reservoirs, dams, water-gates, canals, ditches, flumes, or other means of securing and conveying water for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property."

This Statute was duly submitted to the Congress but was not disapproved, and it remained and continued to be the law of the Territory (fol. 36).

The reference in Section 15 of this Act to public lands must mean the lands of the United States,

because there were no other public lands within the Territory of Utah.

The Territory of Utah became the State of Utah, and as such was admitted to the Union on an equal footing with the original States on January 4, 1896, pursuant to an enabling Act of Congress, approved July 16, 1894, and the proclamation of the President of the United States, dated January 4, 1896. The enabling act provided, by Section 19, that all laws of the Territory in force at the time of its admission into the Union, should be in force in the State, except as modified or changed by the enabling act or by the Constitution of the State. The Constitution of the State of Utah provided by Article 17 that all existing rights to the use of any of the waters of the State for any useful or beneficial purpose were recognized and confirmed; and further provided by Article 24, Section 2, that all laws of the Territory of Utah then in force and not repugnant to the Constitution, should remain in force until they expire by their own limitations, or were altered or repealed by the Legislature. The statute of the Territory of Utah, approved February 20, 1880, hereinbefore mentioned, was not modified or changed by the Enabling Act, was not repugnant to the Constitution of the State of Utah, and accordingly became the law of the State (fols. 36-7).

Almost immediately after the admission of the State of Utah into the Union, it enacted a statute which was approved April 5, 1896, entitled "An Act to encourage the Irrigation of Land, the Mining, Milling, Smelting and other reduction of Ores, and the use and application of the Unappropriated Waters of Natural streams and Water-courses to the Generation of Electrical Force and Energy,

and to provide for the exercise of the Right of Eminent Domain therefor", which provided in part

"the use and application of the unappropriated waters of the natural streams and water-courses of the State to the generation of electrical force and energy to be employed in industrial pursuits are of great public benefit and utility. \* \* \* and such use and application of such waters for the generation of electrical power to be employed as aforesaid are hereby declared to be for the public use, and the right of eminent domain may be exercised in behalf thereof" (fol. 37).

In the following year, the State of Utah enacted a statute entitled "An Act in relation to water rights and irrigation and making provisions regulating the same", which contained provisions identical with Section 15 of the Statute of the Territory of Utah, approved February 20, 1880 (fol. 38). This provision has become Section 1288x21 of the Revised Statutes of Utah.

The reference to public lands in these statutes, enacted since Utah became a State, must mean the same thing as the reference to such lands in Section 15 of the Act of 1880, because the effect of the re-enactment was simply to continue in force the existing law.

Section 3588 of the Revised Statutes of Utah, confers the power of eminent domain for "sites for electric light and power plants" (Subdivision 8) and for "canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light or heat" (Subdivision 10).

It is well settled that each state has power to determine for itself what purposes are public and

sufficient to sustain the exercise of the power of eminent domain.

*Clark v. Nash*, 198 U. S. 361.

*Strickley v. Highland, etc., Co.*, 200 U. S. 527.

*Offield v. N. Y., N. H. & H. R. Co.*, 203 U. S. 372.

It is also well settled that the purpose of developing hydro-electric power for sale generally for light, heat and power is a public purpose.

*Mt. Vernon, Etc., Co. v. Alabama Interstate Power Co.*, 240 U. S. 30.

There can be no doubt that the purpose for which the structures upon the land of the United States, involved in this action, are used, is public, and that the statutes referred to conferred upon the Telluride Power Company and the defendant the power of eminent domain for the purpose of constructing, maintaining, repairing and using such structures upon the land of the United States.

#### POINT IV.

**The various Acts of Congress recognize that the land of the United States is subject to the local law, and that rights of way thereon for the storage and conveyance of water can be acquired without the permission of the Secretary of the Interior.**

The local law of the Territory of Utah with respect to the appropriation of water and rights of

way for storing and conveying water was enacted in statutory form in 1880, as shown at page 46 of this brief. Prior to that date, and subsequently, it was the custom of the inhabitants of the territory, and later of the State, of Utah, to appropriate and use water for any useful purpose, and such appropriation and use of water was necessary in the settlement and development of the country. Such use of water was recognized by the local law as a public use. Originally, all of the land in the Territory was, and now about ninety per cent. of the land in the State is, public land of the United States. It has always been the custom of the inhabitants to construct reservoirs, canals and other water conduits upon such public land without applying for or obtaining any permit from the United States, or paying any compensation therefor. It has always been recognized by the local customs, laws and decisions of the courts of the Territory, and later of the State, that vested rights to the water could be acquired through appropriation and use, and that rights of way for reservoirs, canals and other water conduits could be acquired upon the public land of the United States as well as other land by construction and use (fols. 38-9).

*Jennison v. Kirk*, 98 U. S. 453.

*Broder v. Water Co.*, 101 U. S. 274.

Prior to 1866, there was no Act of Congress providing for or recognizing the appropriation of water or rights of way for storing and conveying water upon the public lands.

On July 26, 1866, Congress passed an Act which contained the following (14 Stat. 253) :

"Sec. 9. *And be it further enacted*, That whenever, by priority of possession, rights to

the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

On July 9, 1870, Congress passed an Act amending the Act of 1866, by adding certain sections, including the following (16 Stat. 218) :

"Sec. 17. *And be it further enacted,* That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory."

These two sections were re-enacted in 1874 as Sections 2339 and 2340 of the Revised Statutes.

It is important to note that these statutes did not purport to grant any new rights, and that in form and substance they recognized and acknowledged the validity of the local customs, laws and

decisions of Courts in respect to the appropriation of water and that rights to the use of water and rights of way for ditches, canals and reservoirs could be acquired upon the public lands in accordance with such local customs, laws and decisions. It has been generally recognized and held that if any person acquired a right to the use of water and constructed a ditch, canal or reservoir for the storage or conveyance thereof, in accordance with the local customs, laws and decisions of the courts, such person had vested rights to the water and the ditch, canal or reservoir as against the United States and all grantees of the United States.

*Jennison v. Kirk*, 98 U. S. 453.

*Broder v. Water Co.*, 101 U. S. 274.

*U. S. v. Rio Grande Irr. Co.*, 174 U. S. 690, 704.

*Gutierrez v. Albuquerque Land Co.*, 188 U. S. 545, 553.

*Utah Light & Traction Co. v. U. S.*,  
Fed. Rep., page . (C. C. A. 8th Circ.,  
Jan., 1916, not yet reported.)

The Government will doubtless concede that if Sections 2339 and 2340 of the Revised Statutes have not been repealed, superseded or modified, the defendant has acquired vested rights to maintain and operate the reservoir, pipe lines and conduits involved in this action upon the land of the United States, and that the bill of complaint should be dismissed.

The Government, however, contends that these sections have been superseded with respect to rights of way for the development of hydro-electric power by subsequent Acts of Congress passed in 1896 and 1901 and that thereafter no rights of way could be acquired for such purposes without the express per-



mission of the Secretary of the Interior. We contend that the later Acts have not superseded, repealed or modified Sections 2339 or 2340 of the Revised Statutes or displaced the local law with respect to the appropriation of water or rights of way for storing or conveying water.

It is necessary to consider the entire history of the legislation of Congress upon this subject.

On March 3, 1875, Congress passed an Act called the Railroad Right of Way Act, which contained the following (18 Stat. 482) :

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

"Sec. 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of

the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

Under this Act it is not necessary for a railroad company in order to acquire a right of way to file a profile of its road or secure the approval thereof by the Secretary of the Interior, as provided in Section 4. Actual construction of the road is equivalent to such filing and approval of the profile because it amounts to an appropriation and identification of the right of way. The courts have treated this Act as a grant of a right of way to be located by the grantee.

*Jamestown & Northern R. R. Co. v. Jones*,  
177 U. S. 125.

*Minneapolis, etc., R. R. Co. v. Doughty*,  
208 U. S. 251.

*Stalker v. Oregon Short Line R. R.*, 225  
U. S. 142.

*Union Pacific R. R. Co. v. City of Greeley*,  
189 Fed. 1.

The result is that although this Act provides for the filing of a profile of the road, and the "approval" thereof by the Secretary of the Interior, it does not confer upon the Secretary the power to determine whether any particular applicant shall have a right of way upon the public land or even to determine the location thereof. The function of the Secretary is purely ministerial. The only effect of his "ap-

proval" is to grant or reserve a right of way before construction. If he refused to approve a profile of a road before construction the applicant could probably compel him by mandamus to do so, but in any event it would acquire the right of way upon and by virtue of construction.

On March 3, 1891, Congress passed "An Act to repeal, timber-culture laws, and for other purposes", which contained the following (26 Stat. 1101) :

"Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch; *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

"Sec. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within

twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing as though filed under it: *Provided*, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

The form of this Act is the same as that of the Railroad Right of Way Act of 1875. Rights of way

hereunder can be acquired by actual construction without the filing of a map or approval thereof by the Secretary of the Interior. Such has been the uniform interpretation by the Secretary of the Interior.

*Battlement Reservoir Co.*, 29 L. D. 112.

*Lincoln County Co. v. Big Sandy Co.*, 32 L. D. 463 (1904).

*De Weese v. Henry Investment Co.*, 39 L. D. 27 (1910).

*Sierra Ditch & Water Co.*, 38 L. D. 547 (1910).

It should be observed that although Section 18 grants a right of way to "any canal or ditch company formed for the purpose of irrigation", Section 20 provides that the provisions of the Act shall apply to "all canals, ditches or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals or association of individuals", and makes specific provision for the papers to be filed by an individual or association of individuals. This must extend the scope of the Act beyond "any canal or ditch company formed for the purpose of irrigation", so as to include all canals, ditches and reservoirs, no matter when, or by whom, or for what purpose, the same may be constructed or used.

The Secretary of the Interior, however, made rulings (erroneously, we contend) to the effect that the Act of 1891 applied only to canals, ditches or reservoirs constructed for the purpose of irrigation, and it is quite likely that this restrictive interpretation was, to some extent, the cause of the enactment of the later Acts of Congress.

*H. H. Sinclair*, 18 L. D. 573 (1894).

The Act of 1891 conferred upon a grantee certain rights which were not given by the local law, to-wit: A right of way extending "fifty feet on each side of the marginal limits" of the canal or reservoir and the right to take from the public lands adjacent thereto, "material, earth and stone necessary for the construction of such canal or ditch." It also gave to a prospective appropriator the privilege of filing a map and securing the approval thereof in advance of construction and thus reserving a right of way as against intervening settlers or other grantees from the United States. This was an important privilege because otherwise the right of way would not become vested until after construction, and while the United States gave the right of way without compensation, it is provided in this Act, as in the Act of 1866, that the appropriator is liable to any settler whose possession is injured or damaged by the construction of the canal, ditch or reservoir.

The provision in the Act of 1891 that the privilege granted shall not be construed to interfere with the control of water for irrigation, or other purposes under authority of the respective states or territories, shows clearly that this Act was not intended to supersede, repeal or modify Sections 2339 and 2340 of the Revised Statutes or the local law with respect to the appropriation of water and rights of way for the storage and conveyance thereof, and such has been the uniform ruling of the Secretary of the Interior.

*Rasmussen v. Blush*, 83 Neb. 678; 85 Neb. 198.

*U. S. v. Utah Power & Light Co.*, 209 Fed. Rep. 554.

*Cottonwood Ditch Co. v. Thom*, 39 Mont. 115, 118.

*Lynch v. Irrigation Co.*, 131 Pac. Rep. 829.

*Pecos, etc., Co.*, 15 L. D. 470 (1892).

*Cache Valley Canal Co.*, 16 L. D. 192 (1893).

*Kings River Power Co. v. Knight*, 32 L. D. 144 (1903).

*Lincoln County Co. v. Big Sandy Co.*, 32 L. D. 463 (1904).

On January 21, 1895, Congress passed "An Act to permit the use of the right of way through the public lands for tramroads, canals and reservoirs and for other purposes" which read as follows (28 Stat. 635) :

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber."*

This Act is not in the same form as, and does not make any reference to, the Act of 1891, but it follows the language of that Act in defining the extent of the right of way, that is, "to the extent of the ground occupied by the water of the canals and



reservoirs and fifty feet on each side of the marginal limits thereof”.

On May 14, 1896, Congress passed “An Act to amend the Act approved March 3, 1891 granting the right of way upon the public lands for reservoir and canal purposes”, which read as follows (29 Stat. 120) :

*“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled ‘An Act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes,’ approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:*

*‘Sec. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power.’ ”*

Although this Act is entitled “An Act to amend the Act of 1891”, the enacting clause amends the Act of 1895 so as to add a new section numbered Section 2. The form of this Act is substantially similar to that of the Act of 1895, except that there is no mention of canals or reservoirs or water, and the total width of the right of way is limited to twenty-five feet.

On May 11, 1898, Congress passed “An Act to

amend an Act to permit the use of the right of way through public lands for tramroads, canals and reservoirs and for other purposes", which read as follows (30 Stat. 404) :

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled 'An Act to permit the use of the right of way through the public lands for tramroads, canals, reservoirs, and for other purposes', approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:*

*'That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way upon the public lands of the United States not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public and other beneficial uses.*

*'Sec. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty and twenty-one of the Act entitled "An Act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.'*"

This Act amends the Act of 1895 by adding two new sections, the first of which has no number, and the second of which is numbered Section 2, in spite of the fact that the Act of 1896 had already added a Section 2 to the Act of 1895. The first section of the Act of 1898 is in substantially the same form as the Act of 1895. The second section, however, refers to the Act of 1891 and provides that rights of way "heretofore or hereafter approved under" that Act may be used for certain purposes.

This Act as well as the Act of 1896, connects the Act of 1895 with the Act of 1891 and shows that all four of the Acts are to be treated as parts of the same scheme of legislation dealing with the same general subject matter.

On February 15, 1901, Congress passed "An Act relating to rights of way through certain parks, reservations and other public lands", which read as follows (31 Stat. 790) :

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacture or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground*

occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named; *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided, further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

The first part of this Act is in substantially the same form as the Acts of 1895, 1896 and the first section of the Act of 1898, and is practically a consolidation of these three statutes. It covers rights of way for "electrical plants, poles and lines for the generation and distribution of electrical power," and canals, ditches, reservoirs, etc., for certain specified purposes and for "any other beneficial

uses". The purposes mentioned in connection with canals, ditches and reservoirs do not include the generation or distribution of electrical power, although they do include every purpose mentioned in the Acts of 1891, 1895, and the first section of the Act of 1898. This indicates that Congress regarded the Act of 1896 as applying only to electrical plants, poles and lines and not to canals, ditches or reservoirs.

It will doubtless be conceded that if the Acts of 1895, 1896 and the first section of the Act of 1898 did not supersede or modify Sections 2339 and 2340 of the Revised Statutes, then the Act of 1901 did not supersede or modify them. It would seem that the prime object of this later Act was to gather together into one statute the various provisions which had previously existed in separate statutes in order to simplify the administration and enable the Secretary to include all subjects under one set of general regulations.

The rules of interpretation to be applied in determining whether a subsequent Act supersedes or repeals a former Act were stated by the Circuit Court of Appeals in *United States v. Utah Power & Light Company*, 209 Fed. Rep. 554, as follows (p. 560) :

"If the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' *United States v. Tynen*, 11 Wall. 88-92; *Davies v. Fairbairn*, 3 How. 636; *Tracy v. Tuffly*, 134 U. S. 206, 223."

The Circuit Court of Appeals through an effort to apply these principles of interpretation held that the Act of 1896 withdrew the subject of generating, manufacturing and distributing electric power from the operation of Sections 2339 and 2340 of the Revised Statutes, and amounted to a prohibition against the construction of canals or reservoirs for such purposes without the express permission of the Secretary of the Interior.

This conclusion is, we submit, wholly unwarranted even by the rules of interpretation quoted by the Court. In the first place, Sections 2339 and 2340 are not repugnant to the Act of 1896 in any of their provisions. There is not a word in either of them which is inconsistent with any word in the other. In the second place the Act of 1896 does not cover "the whole subject of" Sections 2339 or 2340. In the third place the Act of 1896 does not "embrace provisions plainly showing that it was intended as a substitute for" Sections 2339 or 2340. There is in the Act of 1896 no mention of water or water structures or anything to show that it was intended to apply to canals, ditches or reservoirs. Every Act which mentions these structures allows for the right of way the ground occupied and fifty feet on each side. This Act allows only a strip of land twenty-five feet wide, which is much too narrow for a canal or ditch of any size, particularly in a country where changes in elevation require high embankments or deep cuts. Also in the Act of 1896 the area of the "necessary ground" is limited to forty acres, which would accommodate only a small reservoir.

This comparison of the language of the Act of 1896 with that of the other Acts, which apply specifically to canals, ditches and reservoirs, indicates

that the Act of 1896 contemplated only rights of way for power houses and transmission or distributing lines. The purposes mentioned include only "generating, manufacturing or distributing electric power". It is only in a remote sense that canals, ditches or reservoirs can be said to be used for these purposes. Such was the ruling of Assistant Attorney General (now Justice) *Van De Vanter* (28 L. D. 474).

The rules of interpretation are emphatic in requiring that there must be an obvious repugnancy, either expressed or implied, between the new and the old statutes in order to accomplish repeal by implication. It is the object of the Courts to reconcile the two statutes and allow them to stand together, the later supplementing the first, if such an interpretation is reasonably possible.

*Wilmot v. Mudge*, 103 U. S. 217, 221.

*Frost v. Weine*, 157 U. S. 46, 58.

*U. S. v. Healy*, 160 U. S. 136.

There is no doubt that the Acts of 1895, 1896, 1898 and 1901 can all be interpreted as consistent with and additions or supplements to Sections 2339 and 2340, and designed to carry out the same general purpose of encouraging construction upon the public lands of the United States for the benefit and development of the country.

The form of these acts certainly indicates an intention to confer upon the Secretary of the Interior authority to confer upon citizens or associations of citizens of the United States some new or additional privilege rather than to prohibit such persons from exercising existing privileges, without the permission of the Secretary.

It will be admitted that prior to 1895 there was



no act of Congress which restricted or threw any doubt upon the right, theretofore recognized for nearly half a century, of appropriators to acquire rights of way upon the public lands for storing and conveying water in accordance with the local customs and laws.

What explanation is there for any sudden change of the policy of Congress with respect to these matters? And if Congress had decided and intended to change its policy, is it conceivable that it would have enacted such ambiguous statutes as the Acts of 1895, 1896, 1898 and 1901? If Congress had intended to prohibit the construction of canals, ditches and reservoirs without the permission of the Secretary of the Interior, would it not have said so directly instead of indirectly or by implication?

Furthermore, it must be remembered that up to this time there had been no issue or conflict between the United States and the states with respect to the use of public lands. The constitutional question which we have discussed in Point I of this brief had been avoided consistently, and, we might infer, intentionally. Are we not required, if possible, to place upon these acts an interpretation which would not raise such serious questions about the constitutional power of Congress?

We call attention to the fact that Utah was admitted as a state in January, 1896, before the passage of either of the acts upon which the Government now relies.

If the proposition of Point I of this brief is sustained, it would follow that these acts, if interpreted as the Government contends, would be unconstitutional in so far as they relate to the use of the land for public purposes. But even if this proposition is not sustained, how did Congress have

any power to change the laws of property which had been established by the territory of Utah with the sanction and tacit approval of Congress, and which necessarily became the law of the State of Utah upon its admission to the Union? It is unnecessary to dwell upon the necessity for the appropriation of water and structures for storing and conveying the same. Without such rights, the country could never have been settled. Congress unquestionably recognized and submitted to this necessity, and it must be clear that the lands of the United States became bound by and subject to the laws of the country, which, based upon this necessity, originated as customs but gradually developed into the common law of the country and finally were enacted in statutory form. While Congress had the power to make or change laws and rules of property while Utah was a territory, it lost that power when Utah became a state.

We submit that the purpose of the Acts of 1895, 1896, 1898 and 1901, was substantially the same as the purpose of the Act of 1891, to wit, to provide a means by which an appropriator might acquire or reserve a right of way in advance of construction and thus protect himself pending construction against the claims of intervening settlers. It was the purpose of Congress to promote and encourage the beneficial use of water and thus aid and stimulate the growth and development of the country and not its purpose to confer upon the Secretary of the Interior the power to prohibit or prevent appropriators from acquiring rights of way upon the public land.

Each of these acts requires that the regulations to be fixed by the Secretary of the Interior must be general, which means that they must apply gen-

erally to all cases coming within their scope. It stands to reason that in passing upon applications the Secretary must comply with his general regulations and that he can have no power to grant or refuse applications arbitrarily or even to exercise his own judgment or discretion as to whether any particular application ought to be granted or refused. Regulations which permitted arbitrary action or the exercise of judgment and discretion in particular cases would not be general.

The Act of 1895 applied generally to "any citizen or association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber", and any such citizen or association was entitled not only to apply for but to obtain from the Secretary permission to use a right of way for such purposes. Similarly, the Act of 1896, the first section of the Act of 1898, and the Act of 1901 apply generally to "any citizen or association of citizens of the United States", and any such citizen or association was entitled not only to apply for but to obtain from the Secretary permission to use a right of way for any of the purposes mentioned. In other words, the function of the Secretary of the Interior, under these acts, was not discretionary or judicial but was purely ministerial, as under the Railroad Right of Way Act of 1875 and the Act of 1891.

It is well settled that an administrative officer authorized by an act of Congress to make general regulations has no power to enlarge or limit the scope of the act or to impose any conditions or restrictions not authorized by the act. The function of the administrative officer is to carry into effect the expressed will of Congress, and to arrange and administer the procedure and other details. The

adoption of general regulations is authorized for the purpose of orderly administration.

*Morrill v. Jones*, 106 U. S. 466.

*U. S. v. United Verde Copper Co.*, 196 U. S. 207.

*Williamson v. U. S.*, 207 U. S. 425.

*United States v. George*, 228 U. S. 14.

It must follow that the Secretary of the Interior had no authority under the acts in question to impose any conditions or restrictions upon the use of rights of way, for the purposes mentioned, by the citizens or associations of citizens mentioned, which were not already contained in the acts.

Congress had in effect declared that citizens and associations of citizens should have rights of way for certain purposes and it was the duty of the Secretary of the Interior to carry out this expressed will of Congress.

The Act of 1891 provided that the rights granted might be forfeited to the extent that any canal or ditch had not been completed within five years after the location thereof. In order to forfeit a right under this provision, an act of Congress or judicial decree was necessary. It was accordingly difficult to terminate rights granted under this act which were never used, and the records in the Land Office became clogged with unused rights of way which could not be terminated by any reasonable methods and were obstacles in the way of development by appropriators who desired to construct upon the same location.

The Acts of 1895, 1896 and 1898 contain no provisions for revocation. The Act of 1901, however, provides expressly that any permission given thereunder may be revoked by the Secretary of the Interior, or his successor, "*in his discretion*", and

should not be held to confer any right or easement or interest in or to or over the land. This obviously reflects the difficulties arising under the earlier acts. It plainly shows that the permission itself was not intended to confer, and that before construction the permittee did not acquire any right, easement or interest in the land. The permission, however, necessarily gave to the permittee the right or license to construct, which was good against the United States or a grantee from the United States, including settlers. If the permittee acted upon this license and expended money in reliance thereon for the construction of a permanent improvement, he necessarily acquired a vested right under well established principles.

*U. S. v. B. & O. R. R. Co.*, 24 Fed. Cas. 973,  
No. 14,510.

*Chicago, etc., Co. v. Lake*, 22 N. E. Rep.  
616, 617.

*State v. Mayor*, 8 Atl. Rep. 123.

*City of Barre v. Perry*, 73 Atl. 574, 577.

*Harvey v. Aurora Co.*, 57 N. E. 857, 860.

*Natl., etc., Co. v. K. C.*, 65 Fed. Rep. 691,  
694.

*People v. Blocki*, 67 N. E. 809, 812.

*Rerick v. Kern*, 14 S. & R. 267.

*Campbell v. Indianapolis Co.*, 11 N. E. 482.

*Morton Brewing Co. v. Morton*, 20 Atl.  
286.

The Secretary is given power to revoke the permission only "*in his discretion*", which means that it could not be revoked arbitrarily or whimsically, but that there must be some rational ground or reasonable cause for the revocation, such, for in-

stance, as failure to construct within a reasonable time or abandonment.

*Yick Wo v. Hopkins*, 118 U. S. 356, 369.

*U. S. v. Doherty*, 27 Fed. Rep. 730, 732.

*State v Lafayette Co.*, 41 Mo. 222, 226.

*Rose & Co. v. Brown*, 11 West Va. 122, 142.

*Taylor v. Robertson*, 52 Pac. Rep. 1, 3.

*Lovinier v. Pearce*, 70 N. C. 167.

The Government contends that the power of the Secretary of the Interior to revoke the permission "in his discretion" continues after construction and may be exercised in such a way as to destroy the investment and confiscate the property of the appropriator. This interpretation is, we submit, contrary to reason and contrary to the inherent principles of justice and fair dealing. It seems wholly inconceivable that Congress would contemplate the granting of permission to place upon the public land structures of considerable size, importance and value and of a permanent character, with the idea that the appropriator may be wholly deprived of them at some later date by action of the Secretary of the Interior. The impossibility of this interpretation shows conclusively that the Act of 1901 was not intended to supersede, repeal or modify Sections 2339 and 2340 of the Revised Statutes, or to displace the local law with respect to rights of way for storing and conveying water.

As the form of the Acts of 1896 and 1901 is the same as that of the Act of 1895 and the first section of the Act of 1898, it does not seem that Congress could have intended that any one of them should supersede or repeal prior legislation unless it intended that they all should. But it is too clear for argument that Congress did not intend

that either the Act of 1895 or the Act of 1898 should supersede or repeal any prior legislation.

The Act of 1895 and the first section of the Act of 1898 apply only to the public lands *not within reservations*. If these Acts be interpreted to prohibit the construction of canals and reservoirs for the purposes mentioned without the permission of the Secretary of the Interior, the question arises whether they *prohibit* such construction *entirely*, or *permit* such construction *freely* upon the reservations. They certainly confer no authority to *permit* such construction *upon reservations*. Is it reasonable to infer that Congress intended to permit greater freedom in the construction of canals and reservoirs upon forest and other reservations than upon the public lands which had not been withdrawn or reserved for any special purpose?

But if these acts are interpreted to *prohibit* construction *entirely* upon forest reservations they are in direct conflict with the intervening Act of 1897, and the second section of the Act of 1898. The former declares that the waters on such reservations may be used for mining and other purposes under the laws of the State. The latter recognizes and amends the Act of 1891, which applied to the public lands *and reservations*, declaring in so many words that it is, and is to continue, in full force and effect.

*United States v. Port Neuf, etc., Co.*,  
213 Fed. Rep. 601 (C. C. A., 9th Cir.,  
1914).

It thus appears, beyond the shadow of a doubt, that the Act of 1898 was not intended to supersede or repeal the Act of 1891, which in turn was not intended to supersede or repeal Sections 2339 and 2340, or to displace the local law. The two sections of the Act of 1898 unquestionably overlap



each other to some extent, but neither one covers the entire subject-matter of the other. It is impossible to hold that either section supersedes, repeals or limits the other. They must be interpreted so as to be consistent with each other, that is, supplements to each other.

The result is that if a citizen desired a right of way for a canal or reservoir for a *public* purpose, he could apply under either section and the Secretary could "permit the use of right of way" under the first section or "approve" a map of the right of way under the second section.

The approval of a map under the Act of 1891 as amended by the Act of 1898 had merely the effect of granting or reserving a right of way in advance of construction, giving notice by the record in the Land Office, and protecting the appropriator, pending construction, against intervening claims of settlers.

*Lincoln County Co. v. Big Sandy Co.*, 32 L. D. 463.

*De Wesse v. Henry Investment Co.*, 39 L. D. 27.

Why should the permission under the first section of the Act of 1898 have any different effect? Is it not more reasonable to infer that, as they covered to a considerable extent the **same** subject-matter, Congress intended that the effect of procedure under one section of this Act should be the same as under the other?

But if Congress did not intend in 1898 to supersede or repeal the Act of 1891 or Sections 2339 and 2340, how can it be inferred that Congress intended to supersede or repeal them by the Acts of 1895, 1896 or 1901?

Again, although the Act of 1901 includes specifically the purpose of "irrigation" and generally all other beneficial uses of water, the Courts have held and the Secretary of the Interior has uniformly ruled that the Act of 1901 has not superseded or repealed the Act of 1891.

*Lynch v. Irrigation Co.*, 131 Pac. Rep. 829 (Wash. 1913).

*U. S. v. Lee*, 110 Pac. Rep. 607 (N. M.).

*U. S. v. Port Neuf, etc., Co.*, 213 Fed. Rep. 601 (C. C. A., 9th Cir. 1914).

*Regulations under Act of 1901*, 31 L. D. 13.

*Lincoln County Co. v. Big Sandy Co.*, 32 L. D. 463.

*Regulations under Act of 1905*, 33 L. D. 451; 33 L. D. 564.

*Regulations under Act of 1901*, 34 L. D. 228; 35 L. D. 154; 36 L. D. 18; 37 L. D. 338.

*Sierra Ditch and Water Co.*, 38 L. D. 547.

*De Wesse v. Henry Investment Co.*, 39 L. D. 27.

*California-Nevada Canal, etc., Co.*, 40 L. D. 380;

*Instruction*, 41 L. D. 10;

*Malone Land & Water Co.*, 41 L. D. 138;

*H. H. Tompkins*, 41 L. D. 516;

*Joseph Williams*, 42 L. D. 111;

*Manti Livestock Co.*, 42 L. D. 217;

*George B. McFadden*, 42 L. D. 562;

*Boughner v. Magenheimer et al.*, 42 L. D. 595.

But, if Congress did not intend in 1901 to supersede or repeal the Act of 1891, how can it be in-

ferred that Congress intended, by the Act of 1901 or the Act of 1896, to supersede or repeal Sections 2339 and 2340?

Before attempting to apply rigidly the interpretation for which the Government contends and to show other absurd results to which it leads, we desire to call attention to three other acts of Congress: the Forest Reserve Act of 1897; the Reclamation Act of 1902; and the Forest Reserve Act of 1905.

We have already quoted provisions of the Act of 1897, which show that it was not intended to withdraw forest reserves from the jurisdiction or laws of the states in which they were located (*ante*, p. 44). These provisions declare that "all waters on such reservations *may be used* for domestic, mining, milling or irrigation purposes *under the laws of the state* wherein such forest reservations are situated *or under the laws of the United States and the rules and regulations adopted thereunder*". The declaration that such waters might be *used* for certain purposes necessarily carries the implication that rights of way for storing and conveying the water may be acquired on such reservations, because otherwise such waters could not be *used*. The purposes mentioned are broad and comprehensive and substantially the same as those mentioned in Section 2339, which includes mining, agricultural, manufacturing or other purposes. Milling is substantially the same as manufacturing and must include the operation of any kind of a mill or factory by water power. These purposes include specifically the purposes mentioned in the Act of 1895, and are included by the purposes mentioned in the first section of the Act of 1898 and in the Act of 1901. They are broad

enough to include the operation of an electric power plant. This clause gives the option to the appropriator to use the waters either under the laws of the state or under the laws of the United States. It was not necessary to comply with any laws of the United States if the appropriator complied with the laws of the State. This is an unmistakable indication that, at least upon the forest reserves Sections 2339 and 2340 were in full force and effect.

The Reclamation Act of 1902 contained the following section (32 Stat. 390) :

"Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof; *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure and the limit of the right."

This was an unmistakable recognition that the laws of the states and territories relating to the control, appropriation, use or *distribution* of water for irrigation were in full force and effect upon the public lands of the United States. Laws relating to the *distribution* of water must include laws providing rights of way for the *conveyance* of water. The obvious purpose of this section was to prevent

the inference that the withdrawal of lands for reclamation purposes, that is for irrigation, should affect the operation of the local law with respect to the use of water for irrigation.

The Forest Reserve Act of 1905 contains the following (33 Stat. 628) :

“Sec. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.”

It is clear that the rules and regulations to be prescribed by the Secretary of the Interior could not limit or restrict the rights of way granted by the act or impose any conditions upon their use. Congress unquestionably intended that all citizens and corporations of the United States should have rights of way for the purposes mentioned, and no administrative officer could have power to thwart this intention. These rights of way were to continue “during the period of their beneficial use”, which precludes any right of the Secretary of the Interior to terminate the right of way before abandonment by the appropriator.

If the Act of 1896 be interpreted to prohibit the construction of canals and reservoirs upon the public lands and reservations for the generation of electric power, for public or private purposes, without the permission of the Secretary of the Interior,

it is in conflict with Sections 2339 and 2340, which recognized that rights of way for "manufacturing and other purposes" could be acquired under the local law; the Act of 1891, which recognized that rights of way "for irrigation and other purposes" could be acquired under that act or the local law; the Act of 1897 which provided that all waters on the Forest Reservations might be used for "milling purposes" under the laws of the state; the second section of the Act of 1898, which recognized that rights of way "for purposes of a public nature" and "for the development of power as subsidiary to the main purpose of irrigation", could be acquired under the Act of 1891 or the local law; and with the Act of 1905, which granted rights of way upon the Forest Reservations for "municipal purposes", subject to the laws of the state or territory.

If the Act of 1901 be interpreted to prohibit the construction of canals and reservoirs upon the public lands and reservations for the purposes mentioned therein, without the permission of the Secretary of the Interior, it is in conflict with Sections 2339 and 2340, the Act of 1891, the Act of 1897, the second section of the Act of 1898, and the Act of 1905, because it applies to canals and reservoirs upon the public lands and reservations for all the purposes mentioned in said Acts; and it is also in conflict with the Reclamation Act of 1902, which provided that it should not affect or in any way interfere with the laws of any state or territory relating to the "control, appropriation, use or distribution of water used in irrigation or any vested right acquired thereunder," and that the Secretary of the Interior should proceed in conformity with such laws.

The interpretation for which the Government contends imputes to Congress an intention to change every year or two the method of acquiring rights of way for canals and reservoirs upon the public lands, and deprives its legislation of all claim to consistency or a rational policy. On the other hand, if these various acts be interpreted, not as restrictions upon or prohibitions against the construction of canals and reservoirs, but merely as supplements or additions to the prior acts and as conferring upon the Secretary the power to confer upon the appropriators some additional privilege, they are all consistent with each other and parts of a harmonious scheme of legislation designed to promote and encourage the settlement and development of the country.

Under our interpretation the various Acts overlap each other to some extent and some portions of them are superfluous. But obviously such a result is preferable to positive conflicts and inexplicable reversals of policy. We believe that a careful study of the two sections of the Act of 1898, and their relation to each other, furnishes the key to the interpretation of the entire scheme of legislation.

There are some features of these Acts which it is impossible to explain upon any rational theory, such, for instance, as the discrepancy between the title and the enacting clause of the Act of 1896, and the effort of the Act of 1898 to add two new sections (the first not numbered and the second numbered 2) to the Act of 1895, to which a section 2 had already been added by the Act of 1896. But it would seem that in all of this legislation Congress was reaching out for and trying to develop three fundamental ideas; first, that an appropriator, before construction, needed protection against



the intervening rights of settlers or others claiming under the United States; second, that an appropriator, after construction, needed protection against everybody; and, third, that before construction the Government needed protection against grantees or permittees who failed to construct within a reasonable time but still claimed rights of record and thus obstructed development by others. That these three ideas are essential to any orderly scheme of administration will not be questioned.

There is one other Act of Congress which may be mentioned as throwing some light upon the interpretation of the Acts of 1896 and 1901, to wit, the Act of March 4, 1911, which included the following (36 Stat. 1253):

"That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not in-

compatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for non-use for a period of two years or for abandonment."

This furnished a method by which a permanent or quasi-permanent right could be acquired for structures not nearly so important to the development of the country as those for the storage and conveyance of water. Is it conceivable that Congress intended to make rights of way for pole lines any more permanent or secure than those for the storage and conveyance of water? Is not this Act of 1911 rather an indication that Congress recognized that structures for the storage and conveyance of water were adequately protected by Sections 2339 and 2340 and that it desired to give substantially similar protection to rights of way for pole lines?

The Secretary of the Interior has never made any ruling or claim that Sections 2339 and 2340 have been superseded or repealed. On the contrary, he has made rulings since 1901 which recognized that these sections were still in full force and effect.

*Lincoln County Co. v. Big Sandy Co.*, L. D. 463 (1904);

*DeWeese v. Henry Investment Co.*, 39 L. D. 27 (1910).

To the same effect, see *Lynch v. Lower Yakima Irrigation Co.*, 131 Pac. Repr. 829 (Washington, 1913).

Between 1891 and 1906, many reservoirs, canals and other water conduits were constructed upon the public lands and reservations with the knowledge of the United States, without the permission

or approval of the Secretary of the Interior, which, if the Government's interpretation be correct, were unlawful and in violation of these Acts of Congress. Nevertheless, no officer or representative of the United States had until some time in 1909 objected to or protested against the construction or use of such reservoirs, canals, or other water conduits or demanded any compensation therefor. The interpretation for which we are contending was adopted and followed by the various Departments of the United States Government between 1891 and 1909. During that period it was the settled practice of these Departments to allow, and the United States did in fact allow without protest or objection, the construction and use of reservoirs, canals and other water conduits upon the public lands for mining, agricultural, manufacturing and other purposes without the filing of maps or the approval or permission of the Secretary of the Interior or the payment of compensation. During this period many millions of dollars of capital were invested in reliance upon the regulations, rulings and decisions of the Secretary of the Interior and the settled practice of the Departments of the United States Government (fols. 43-46).

It was not until after the construction and completion of the hydro-electric power works of the defendant that the Department of Agriculture attempted to place upon these acts of Congress an entirely new interpretation for the purpose of extending its jurisdiction and powers over the forest reserves. Even to-day the Department of the Interior has not adopted the interpretation of the Department of Agriculture. All of the cases which have been brought by the United States against hydro-electric power companies have attacked only

the rights of such companies upon forest reserves. No attempt has been made to oust any such companies from public lands not within reservations, even in cases where they have constructed without the approval or permission of the Secretary of the Interior.

### **POINT V.**

**The defendant and its predecessor have not violated any lawful regulations of the Secretary of the Interior or the Secretary of Agriculture respecting the use of a right of way for the storage and conveyance of water, and have the right under the Acts of 1901 and 1905 to maintain and operate their structures upon the land of the United States.**

Even if it be assumed for the sake of argument that the Act of 1901 superseded and repealed all prior acts and displaced the local law, the decree appealed from should be reversed. The most that the Government can reasonably claim for this act is that it confers upon the Secretary of the Interior power to make regulations respecting the *use* of rights of way, including the procedure granting permission to use such rights of way.

In view of the fact that these regulations must be general, which means that they must be reasonable, and the further fact that the Act applies to "any citizen, association or corporation of the United States", it is clear that the procedure for

granting permission to use the right of way is a purely formal matter and that the *use* of the right of way cannot be prohibited or unreasonably restricted. The regulations may include reasonable provisions to protect the interests of the United States, avoid risk of damage to the forests through fire, overflow of water, etc., and possibly with respect to the *method* of construction, materials to be used, etc.

There is no express authority in the Act of 1901 for charging or collecting compensation for the use of the land of the United States, and it may well be argued that the United States has waived its right to compensation. But even if it be held that the Secretary of the Interior has power to include in his general regulations provision for compensation, it would seem that the amount of compensation must be measured by or determined with reference to the value of the land occupied by the right of way. He might charge at the outset a sum equal to the reasonable value of the land or charge each year a sum equal to the reasonable rental value of the land, but it would be contrary to the spirit of the act to hold that the Secretary had power to make charges which were excessive or prohibitive and out of all proportion to the value of the land.

There is no allegation or claim that the defendant or its predecessor has violated any regulation respecting the *use* of rights of way for storing or conveying water. In fact, we do not know of any regulation made by the Secretary of the Interior affecting the *use* of the right of way as distinguished from the procedure for obtaining permission to use it, or providing for the payment of compensation therefor.

The only regulations of the Secretary of the Interior with which the defendant or its predecessor have not complied are those which prescribe the method of making applications for the permission to use the right of way, and specify the papers, maps, certificates, etc., which must be filed. These regulations are purely formal, with which the defendant might comply at any time. But there is no claim or allegation that the Secretary of the Interior has ever objected to the construction or operation of the structures of the defendant or demanded that the defendant make application for his permission or otherwise comply with his regulations. The mere failure to apply for a formal permission which the defendant is absolutely entitled to have is surely not a substantial ground for confiscating its property.

The only complaint made in this action is that the defendant has not complied with the regulations of the Secretary of Agriculture relating to national forests, and a serious question arises at the outset respecting the validity of such regulations.

The Forest Reserve Act of 1905 authorized the Secretary of Agriculture to execute all laws affecting forest reserves "excepting such laws as affect the \* \* \* appropriating \* \* \* of any of such lands", and, by Section 4, grants rights of way for storing and conveying water for certain purposes, "under such rules and regulations as may be prescribed *by the Secretary of the Interior*, and subject to the laws of the State or territory in which said reserves are respectively situated."

It would seem that the laws of the United States affecting the "*appropriating*" of forest reserves must include laws relating to rights of way for the storage and conveyance of water, and this interpre-

tation is practically required by the provision of Section 4, which leaves with the Secretary of the Interior the matter of making rules and regulations with respect to the rights of way therein granted.

It would seem that the Congress intended to confer upon the Secretary of Agriculture control over uses of the forest reserves which were of a temporary nature, but to leave under the authority of the Secretary of the Interior those of a permanent nature, and such was the interpretation placed upon this act by the two Departments.

See letter of the Secretary of the Interior to the Secretary of Agriculture dated June 8, 1905 (33 L. D. 609).

The rights of way granted by Section 4 were to continue "during the period of their beneficial use", which clearly indicates, as was the fact, that the use for the storage and conveyance of water is of a permanent nature.

It is hard to understand why the execution of the laws relating to rights of way for the storage and conveyance of water for irrigation or domestic purposes should be transferred to the Secretary of Agriculture, when similar rights of way for "municipal or mining purposes and for the purpose of the milling and reduction of ores" were to remain subject to the rules and regulations of the Secretary of the Interior; and it is hard to understand why rights of way for these last mentioned purposes should continue "during the period of their beneficial use", unless rights of way for the various other purposes mentioned in the Act of 1901 were also to continue during the period of their beneficial use.

But in any event, even if it be assumed, for the purpose of argument, that the Act of 1905 trans-



ferred to the Secretary of Agriculture authority to execute the Act of 1901, in so far as it related to the forest reservations, it cannot follow that the authority of the Secretary of Agriculture thereunder would be any greater than that previously vested in the Secretary of the Interior. The principles which we have already mentioned with respect to the nature and scope of the general regulations under this Act would still apply.

It is clear that all question respecting the right of the defendant to maintain its structures involved in this action must be set at rest by the Act of 1905, which granted rights of way for "reservoirs \* \* \* flumes, pipes, \* \* \* and canals, within and across the forest reservations of the United States \* \* \* to citizens and corporations of the United States for municipal \* \* \* purposes."

As soon as the land involved in this action was made a part of the Wasatch National Forest the defendant and its predecessor became grantees of a right of way under this Act.

"Municipal purposes" as used in this Act must include all purposes for which a municipality may use water. "Municipality" in this connection must include not only cities, towns and villages, but also the state or any governmental subdivision of the state, and "municipal purposes" must be co-extensive with "public purposes."

*Cook v. Portland*, 13 L. R. A. 533.

There is no doubt that the defendant and its predecessor have used the structures in question for "municipal purposes." The electric energy generated by the hydro-electric power works has been used not only for general public purposes, but also for the lighting of the streets of cities and towns.

It has been used for municipal purposes in the strict sense and also in the broad sense (fols. 5-6).

It may be argued that the Act of 1905 grants rights of way for municipal purposes only when they are used by municipalities. Such an interpretation is not justified. The Act grants rights of way generally to "citizens and corporations of the United States". Municipalities are not mentioned as grantees. It is not the character of the grantee, but rather the purpose for which the right of way is used that determines whether it is included by the Act, and the broad terms used in describing the grantees show conclusively that Congress did not intend to restrict to "municipal corporations" the use of rights of way for municipal purposes.

A most cursory examination of the rules and regulations of the Secretary of Agriculture, relating to hydro-electric power companies, shows that they are unreasonable and not authorized by any of the Acts of Congress. It is the purpose and effect of these regulations to supervise, control and tax the business. They are not restricted to regulation of the use of the land of the United States. They assume sovereign or legislative powers as distinguished from the rights or powers of the owner of the land. They assume that no right of way can be acquired unless the Secretary of Agriculture thinks it wise or desirable and then only upon compliance with regulations made ostensibly for the protection of the public in general. They assume powers which only a state could properly exercise.

The provision with respect to the charge or tax to be paid by the power company is a fair illustration of the character of the regulations. This charge or tax is based upon the amount of horse power

developed or the number of kilowatt hours of electric energy generated at the power plant of the company, regardless of the value of the land of the United States which is used or occupied by the plant (fol. 50). This means that if only an infinitesimal portion of the reservoir or water conduit is upon land of the United States and all of the rest of the plant, including the balance of the water conduits, the power house, etc., are upon land belonging to the company, nevertheless the charge or tax is the same as if the entire plant were upon land of the United States. Upon this basis it is apparent, in many cases, that the charge or tax payable for one year may exceed the fee value of all the land of the United States which is used or occupied.

While it is held that in estimating the value of land to be paid by a public service corporation, when exercising its power of eminent domain, the adaptability of the land for various uses may be taken into consideration, because such adaptability affects the fair market value of the land, it is well settled that the adaptability of the land for the special purpose of the public service corporation, must be excluded from consideration. The thing to be determined is not the value of the land to the public service corporation but the amount of compensation which is just and fair for what the owner loses. A riparian owner of land has no property interest in the water power which may be developed in the stream through employment of capital, brains, effort, etc.

*United States v. Chandler-Dunbar Water Power Company*, 229 U. S. 53.

*City of New York v. Sage*, 239 U. S. 57.

We do see why the measure of the compensation to be paid to the United States for land taken or

used by a public service corporation for a public purpose should be any different from the measure of compensation to be paid to a private owner for land which is taken or used by the United States for a public purpose.

## POINT VI.

**The United States is estopped in equity to enjoin or otherwise interfere with the maintenance or operation of the structures of the defendant involved in this action.**

It is well settled that a sovereign is, with respect to its property or proprietary interests, subject to the principles of equitable estoppel, in the same manner and under the same circumstances as a private individual or corporation.

*Indiana v. Foulk*, 11 Fed. Rep. 398.

*United States v. Willamette, etc., R. R. Co.*, 54 Fed. Rep. 807.

*Michigan v. Railroad Co.*, 69 Fed. Rep. 116.

*Walker v. United States*, 139 Fed. Rep. 409.

*Mountain Copper Co. v. United States*, 142 Fed. Rep. 625 (C. C. A., 9th Circuit).

*Iowa v. Carr*, 191 Fed. Rep. 257 (C. C. A., 8th Circuit).

*Iowa v. Trust Co.*, 191 Fed. Rep. 270 (C. C. A., 8th Circuit, 1911).

*Hemmer v. United States*, 204 Fed. Rep. 898 (C. C. A., 8th Circuit).

In *State of Iowa v. Carr, supra*, the plaintiff contended that every sovereignty was exempted from the rule of equitable estoppel, but the Court, through Sanborn, C. J., with whom Van Devanter, C. J., and Pollock, D. J., concurred said:

"But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances. The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances" (Citing cases).

In *Mountain Copper Co. v. United States, supra*, the Court said:

"It is the well established law that, when the government comes into a court asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less" (Citing cases).

It is well settled that when a public service corporation, having the power to condemn property, constructs its plant upon land of another, without condemnation or agreement, but without objection from the owner, the public service corporation will not be ousted either by ejectment or injunction, the owner's remedy being limited to the recovery of the reasonable value of the land.

- Roberts v. North Pacific R. R. Co.*, 158  
U. S. 1.  
*Northern Pacific R. R. Co. v. Smith*, 171  
U. S. 260.  
*Donohue v. Railroad Co.*, 214 U. S. 499.  
*Miocene Ditch Co. v. Jacobsen*, 146 Fed.  
Rep. 680 (C. C. A. 9th Cir.).  
*Eastern Ore Co. v. Des Chutes R. R. Co.*  
213 Fed. Rep. 897.  
*Kamper v. Chicago*, 215 Fed. Rep. 706  
(C. C. A. 7th Cir.).

Furthermore, *even when the public service corporation has not the power to condemn the property in question*, equity will not restrain it from maintaining or operating its plant, but will merely require it to pay damages, measured by the reasonable value of the land.

- New York City v. Pine*, 185 U. S. 93.  
*West & Co. v. Octoraro Water Co.*, 159  
Fed. Rep. 528.  
*McCann v. Chasm Power Co.*, 211 N. Y.  
301.

The predominating considerations which influenced the courts in the decision of these cases were that the owners of the land had not acted seasonably to prevent the construction of the plant undertaken by the defendant, and that the issue of an injunction would cause the defendant serious loss and the public great inconvenience, while the injury to the owner of the land was slight, or could be compensated for in damages. The result was not to deprive the owner of *all* remedy but merely to limit his remedy to damages. His failure to act promptly was sufficient to defeat his appeal for the equitable remedy by injunction, which is intended

to be used to promote justice, and not as an instrument of oppression.

In *New York City v. Pine*, *supra*, it was recognized that if the plaintiff had acted promptly, before the defendant had commenced the work of construction and expended money, the injunction would have issued.

In the present case the answer of the defendant shows not only that its hydroelectric power works were constructed at very great expense and with the knowledge of the plaintiff, that the plaintiff had not until some years after such works were completed and in operation objected to or protested against the use of its land, that to enjoin the maintenance and operation of such works will cause serious loss to the defendant and great inconvenience to the public served by the defendant, and that the continued maintenance and operation of such works will cause no loss or damage to the plaintiff, but also that the defendant's predecessor constructed the works with the honest belief that rights of way therefor could be acquired without any grant or formal permission and that such belief was encouraged and justified by the rulings, decisions, policy and settled practice of the various Departments of the United States Government (fols. 43-8).

The Departmental rulings and decisions upon these matters are authoritative and binding upon the United States.

*U. S. v. California Land Co.*, 148 U. S. 31.

In addition to decisions sustaining the application of the principles of equitable estoppel, it has been held that the United States has, by tacit acquiescence, estopped itself from questioning the



validity of rights of way upon the public land for the storage and conveyance of water.

*Jennison v. Kirk*, 98 U. S. 453.

*Broder v. Natoma Water Company*, 101 U. S. 274.

In the case last cited it was held, independently of any Act of Congress, that the defendant had acquired a right of way for a ditch upon the public land merely by construction and use. The land was in the State of California and the ditch was constructed before 1866. It was admitted that the defendant had no grant from Congress. The plaintiff acquired the land from the United States after construction of the ditch and subject to lawful claims. The Court held that the defendant had a lawful claim, and said at page 276:

"It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: *Atchison v. Peterson*, 20 Wall. 507; *Basey v. Gallagher, id.*, 670; *Forbes v. Gracey*, 94 U. S. 762; *Jennison v. Kirk*, 98 *id.*, 453."

Here was a direct holding that the Government had, "*by its conduct recognized and encouraged*" the construction of ditches upon the public land and "*was bound to protect*" them. Why is not the defendant in the case at bar equally entitled to be protected with respect to its structures?

In the present case the defendant and its predecessor were "*encouraged*" by the rulings and the settled practice of the various Departments of the United States Government to enter upon the land and construct its reservoir and pipe line or conduit at considerable expense. We have here not only tacit acquiescence on the part of the Government, but affirmative encouragement through the conduct of its representatives charged with the administration of the public land. It is inconceivable that the defendant's predecessor would have made these expenditures if it had not believed that it was acquiring permanent rights, and it is inconceivable that the United States could knowingly have permitted them to be made, without objection or warning, if it had intended to claim that the structures were unlawful or that the owner acquired no vested right to maintain them.

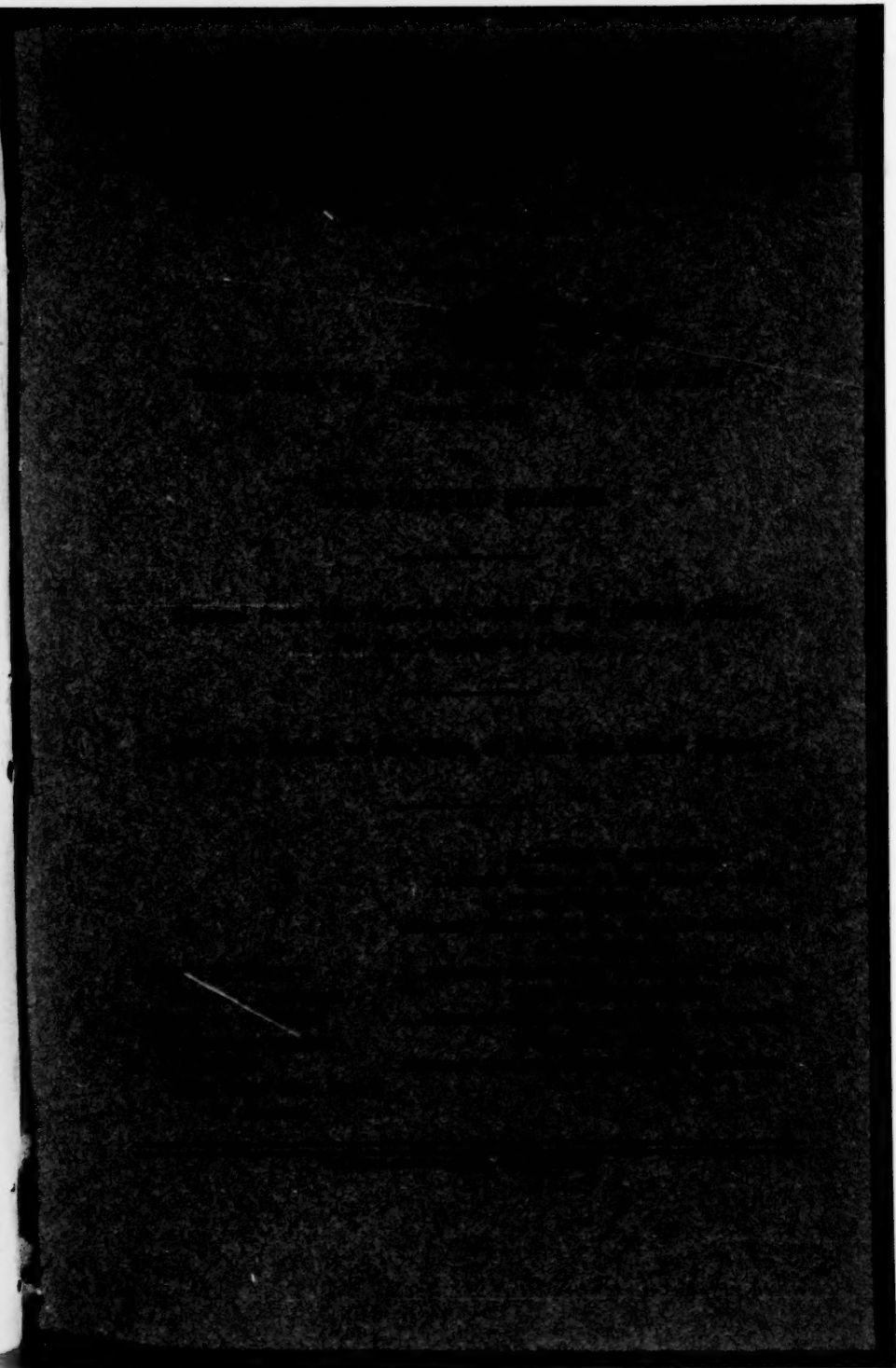
## POINT VII.

**The decree should be reversed and the bill of complaint should be dismissed.**

Respectfully submitted,

GRAHAM SUMNER,  
WILLIAM V. HODGES,

Counsel for Utah Power and Light Co.



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# In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1915.

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No. 574.

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THE BEAVER RIVER POWER COMPANY,  
APPELLANT,

VS.

THE UNITED STATES.

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*Appeal from the District Court of the United States  
for the District of Utah.*

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**Brief on Behalf of the State of Utah and Other States.**

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## **Statement of the Case.**

This is an appeal from a decree of the United States District Court for the District of Utah, enjoining the defendant from maintaining and operating a hydro-electric plant on lands of the plaintiff within a forest reserve in the State of Utah.

The plant in question was constructed principally during the years of 1906 and 1907, and has been in

operation ever since the spring of 1908, supplying electric current within said State for various domestic, industrial, agricultural and municipal purposes.

The construction of hydro-electric power plants during the past quarter of a century in this country is a matter of common knowledge. Where such plants have touched or traversed the public domain with necessary easements it is fair to say, as was said by this court with respect to the early diversion of water for mining and agricultural purposes, that all this was done with the tacit recognition and encouragement of the Federal Government. In a number of the recent cases against power companies brought by the Federal Government, there appears to have been actual knowledge, consent and acquiescence on the part of Federal officials concerning the construction and operation of such plants. In the case of *Utah Power & Light Company v. United States*, decided by the Circuit Court of Appeals for the Eighth Circuit, November 24, 1915, and also in the case of *United States v. Colorado Power Company*, decided by the District Court for Colorado, January 8, 1916, it appears that maps of rights of way were approved by the Secretary of the Interior under the Act of February 15, 1901. In the case of *Utah Light & Traction Company v. United States*, decided at the same time as the case first above mentioned, it appears that the plant of that company near Salt Lake City has been in operation since 1896.

In this case against the Beaver River Power Company it appears (Transcript, pages 18-21), as alleged

in the answer and admitted by the pleadings, that, prior to the establishment of the Beaver National Forest wherein the works are situate, the predecessors in interest of the defendant had initiated certain appropriations of water for power purposes on the unreserved public lands, in compliance with the local laws; that, thereafter, they were notified of the intention to establish a forest reserve, whereupon the accredited agents of the plaintiff were informed that the creation of such a reserve would seriously interfere with, if it did not defeat, the power project, unless some definite agreement should be made in respect thereto; that, thereupon, it being desired by all parties, including the State of Utah, that the proposed hydro-electric development should be prosecuted to completion, it was agreed that after the executive order creating the forest reserve should be promulgated, the authorized agents of the Government would approve an application for the necessary rights of way in the forest reserve for the proposed power development under the Act of February 1st, 1905; that, thereafter, the forest reserve was established upon such understanding and agreement, and that pursuant thereto the power works were prosecuted to completion with the full knowledge, acquiescence and approval of the plaintiff, its officers and agents. It will be seen from the statement of the foregoing facts that appellant throughout acted in entire good faith and in reliance upon what it was led to believe would be the rule of conduct on the part of the United States, its agents and representatives.

The use of water for the specific purpose of generating electricity, among other purposes, and the use

of rights of way over all lands within said State for the purpose of generating and distributing electricity, and for other purposes of a public nature, are declared by the laws of Utah to be public uses.

The prayer of the bill is for an injunction, restraining the defendant from maintaining and operating its plant, until it shall have complied with the current rules and regulations of the Department of Agriculture.

The effect of the injunction appealed from is to put a stop at once to an essential public use within said State, authorized by the laws thereof, or to compel the defendant, as a condition of continuing its operations, to enter into an agreement with the Secretary of Agriculture, whereby it must consent that its occupancy of the necessary rights of way may be terminated at any time within the discretion of said Secretary; that it will pay certain charges to the Federal Government, based on the net generating capacity of the plant, and fixed by the arbitrary decision of said Secretary; that it will transfer said property, so situated on the public land, and all other property owned by it and necessarily connected therewith, to the plaintiff, or to the nominee of said Secretary, at a price to be fixed by said Secretary; that it will not enter into any agreement in restraint of trade within said State; that it will agree to submit to such regulation as to rates and service, accounting, inspection of books and records, etc., as may be prescribed by said Secretary, and that it will assume various burdensome obligations, including those which may be imposed by any future rules and regulations of the Department of Agriculture.

The regulations of both the Department of Agriculture and the Department of the Interior (Transcript, 32-133, at pages 51 and 81) contemplate that the regulatory powers of the said Secretaries, by means of the permissions so granted by either of them, shall continue indefinitely, even after the title to the land traversed by the permitted right of way shall have passed from the United States into private hands, or even to the State itself.

The land owned at the present time by the Federal Government in the State of Utah constitutes about four-fifths of the entire area of said State.

If the Federal Government can control the appropriation and use of water in this particular instance, **and exercise a governmental control over this particular public use**, it follows that it may exercise a similar control over all appropriations of water for any purpose whatever, and over all public as well as private uses, of whatsoever kind or nature, whenever such appropriation or use involves the occupancy of any public land.

It follows, also, that if the Federal Government can exercise such governmental control over appropriations of water and other public uses within the State of Utah, it may exercise a like control within any other State in which there are any public lands, although it could not do so in the original States, nor in any other State in which there are no public lands.

The State of Utah, therefore, in her own right as a State of this Union, and as the guardian and representative of all her citizens, and to the end that her equal rights as a member of the Federal Union may be preserved, and the equal rights and privileges of



her citizens protected, files this brief; and the other public-land States, whose names appear on this brief, feeling that they are aggrieved in the same manner and to the same extent as the State of Utah by the consequences of the decree in this case, respectfully join herein.

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### **Specifications of Error for Argument.**

The following specifications of error in the proceedings and decree, which are in substance set forth in appellant's Assignment of Errors, are relied upon for a reversal of the decree.

I. The decree is contrary to the Constitution of the United States, Article IV, Section 3, and the Tenth Amendment, in that it deprives the State of its reserved legislative power to declare what uses of property within its jurisdiction are public uses, and to provide for the creation, continuance and regulation of such uses, and in that it concedes to the United States governmental powers which are not conferred by said Article or by any other provision of the Constitution of the United States.

II. The decree is contrary to the intent of the statutes of the United States concerning rights of way over the vacant public domain for uses which are declared by the laws of the States to be public uses, control over which uses is essential as well to the political existence as to the internal polity and development of said States.

III. The regulations of the Department of Agriculture and of the Department of the Interior, which,

as shown by the prayer of the bill, it is the purpose of this and other similar suits to enforce, are contrary to the Constitution and laws of the United States made in pursuance thereof, in that they assume for said Departments governmental powers which are not conferred upon the United States by the Constitution and which it was not the intent of Congress to confer upon said Departments or either of them.

IV. The suit is not one of equitable cognizance, and the decree of injunction is contrary to the principles of equity and good conscience.

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### **Argument.**

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#### **I.**

##### *The Constitutional Phase of the Question.*

From the foregoing statement it will be seen that the question which is immediately involved in this cause—namely, whether the laws of a State regulating the appropriation and beneficial use of water are controlling and exclusive of any other control except the power of Congress over navigation, which is not here involved—is only a part of the larger question whether a State, subject only to the limitations of the Federal Constitution, may determine by its own legislative acts what uses are public within its dominions, and provide for their creation, continuance and regulation, or whether the United States may, merely by virtue of its ownership of public lands, exercise the powers of local government over such uses where they

require the occupancy of any vacant public lands within a State, and thus override the laws of the State on the subject.

In other words, the discussion of the law governing this case seems necessarily to involve, at the outset, a discussion of the fundamental principles of our dual form of government.

That the Federal Government created by the Constitution is one of delegated powers, that within the sphere of those powers its authority is supreme; and, on the other hand, that "the great mass of legislation relating to our internal affairs was intended to be left where the Federal Convention found it—in the State governments," and that within the sphere of their reserved powers their authority is equally supreme, are principles so well established in our constitutional jurisprudence that it is only necessary here to state them.

A dual system of government was established by the Constitution, and it was the intention of its framers that the National Government should exercise its powers over the national affairs committed to its care by the Constitution, and that the States should exercise their reserved powers over their local affairs, so that neither should encroach upon the other; and that they should so operate and mutually sustain each other that there might be no collision or conflict between them.

It is not surprising that through ignorance and self-interest there have been many attempted encroachments of one sovereignty upon the just powers of the other, and that sad and serious conflicts, often difficult of solution, have arisen; but the Constitution

was never intended to give its countenance to any such encroachment or conflict. In its clear light and true interpretation, there is no twilight zone. What may seem so is due not to lack of light, but to defect of vision. And while it may be necessary to apply the provisions of the Constitution to changed conditions, and new situations, as they arise, its words mean to-day what they meant when they were first written.

That every State admitted into this Union is of necessity upon an equal footing with the original States in all respects whatever, is equally well established. And however interesting in this connection is the history of the formation of our institutions of government, and however illuminating are the oft-repeated declarations of this fundamental principle by this Honorable Court, we refrain at this time from any citation of authorities upon a matter which is so familiar to the minds of the Court.

This brings us to the fundamental question whether the existence of vacant public land within a State gives to the Federal Government within that State any other or greater governmental powers than it possesses in those States in which there is no public land.

In the light of the history of the formation of the Constitution, in the light of its own provisions, and in the light of the many clear and forcible declarations of this Court upon the principle here involved, without a dissenting voice, the question would seem to answer itself in the negative. But the insistence to the contrary in this and other suits recently instituted at the instance of the executive departments of the Federal Government, demands that the question be

seriously considered and that an absolute demonstration of the negative answer be made.

The plenary legislative power of Congress within the Territories of the United States is not subject to question; and in the best-considered opinions of this Court that power is rested upon the power of the Government to acquire territory, by occupancy, purchase, conquest or treaty.

That this power of governing the Territories does not rest upon the ownership of the soil is susceptible of complete demonstration. Suppose, for example, that when the sovereignty over the territory now embraced within the State of Utah was acquired from Mexico in 1848, every foot of its soil had been conveyed to private individuals by the Republic of Mexico. Would not the power of the United States to govern the territory be identically the same as in the actual case, where none of the soil had passed into private ownership? But we are not here concerned with any questions involving the governmental powers of the United States within its Territories. The question is, what powers has it within the States in which there is still public land, which are solely due to the existence of such land?

The clause in the Constitution which seems to have the most direct bearing on this question is the second paragraph of Section 3, Article IV.

Said Section 3 reads as follows:

“Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of

two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

In view of the fact that the Circuit Court of Appeals for the Eighth Circuit, in the case of *United States v. Utah Power & Light Co.*, 209 Fed. 554, in reversing the decree of the District Court dismissing plaintiff's bill, rested its opinion entirely upon this clause in the Constitution, construing it as if it gave to Congress plenary legislative powers over lands held in Federal ownership, whether in a State or Territory, even "though such legislation may involve the exercise of the police power;" and in view of the further fact that in the case of *Kansas v. Colorado*, 206 U. S. 46, Justice Brewer, in the opinion of the court delivered by him, said that "the full scope of this paragraph has never been definitely settled," it becomes our duty in the view we take of the instant case—and, if we are correct in our view, it becomes the duty of this Court—to study this paragraph with the utmost care and attention, to try to ascertain its full scope, with all the light available, and to apply it to this case in its true meaning and in harmony with other applicable provisions. As was said in the opinion of the Circuit Court of Appeals, after quoting this paragraph, with both errors and omissions, "This is the

supreme law of the land and embodies an express grant of power to the national government." There is no disputing that statement. Being a part of the Constitution, that clause is a part of the supreme law of the land. But the question here is, what is its meaning?

There is, it is believed, no other clause in the Constitution in which words are so obviously used in a double sense, and intended to cover so many things. And yet, when we look into the history of the times, and study the actual situation to which this clause was intended to apply, the intention of the framers of the Constitution with respect thereto, and the instrument itself as a whole, we believe that its scope and meaning will become perfectly clear, at least so far as to show that the construction put upon it by the Circuit Court of Appeals above referred to is utterly erroneous, and inconsistent with the whole spirit of the Constitution.

One of the greatest obstacles to the adoption of the Articles of Confederation was the existence of numerous conflicting and overlapping claims to the territory lying between the western boundaries of the original States and the Mississippi River. There was, moreover, a strong feeling among the six States having no claims to western territory, especially in Maryland and Delaware, that the paramount title to this territory was and should be in the Union itself, for the reason that it had been won by the joint efforts of all the colonies, and ceded to the United States by the treaty of peace. The general assembly of the State of Maryland voiced this sentiment in vigorous and em-



phatic language in a letter to their delegates in Congress on May 21, 1779, instructing them "not to agree to the confederation unless an article or articles be added thereto in conformity with our declaration."

Moved by the strong attitude and appeal of Maryland, and with a view to settling a controversy which seemed to be so fraught with disaster to the embryonic republic, Congress on September 6, 1780, passed a resolution urging the States to yield up their claims to the western territory, and on October 10, 1780, a further resolution from which we quote the first and last clauses (see *The Public Domain*, Executive Document 47, part 4, H. R. 46th Congress, 3rd Session, p. 64) :

"RESOLVED, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular State, pursuant to the recommendation of Congress of the 6th day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which shall become members of the Federal Union, and have the same rights of sovereignty, freedom and independence, as the other States."

"That the said lands shall be granted or settled at such time, and under such regulations, as shall hereafter be agreed on by the United States, in Congress assembled, or any nine or more of them."

Pursuant to this action of Congress, the general assembly of Virginia, on January 2, 1781, made an offer to cede her western lands, which was accepted, and a deed was executed March 1, 1784, to the United

States by her delegates in Congress, Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe. This deed recited the act of the general assembly providing that all the right, title and claim, as well of soil as jurisdiction, which the State of Virginia had to the Northwest Territory should be conveyed to the United States, upon condition that the territory so ceded should be laid out and formed into States, "and that the States so formed shall be distinct republican States, and admitted members of the Federal Union; having the same rights of sovereignty, freedom and independence, as the other States." New York ceded her claims March 1, 1781; Massachusetts, April 19, 1785; Connecticut, September 13, 1786 (excepting the Western Reserve, jurisdiction over which was ceded May 30, 1800); South Carolina, August 9, 1787; North Carolina, February 25, 1790; and Georgia, April 24, 1802.

Thus, at the time of the formation and adoption of the Constitution, all the claims of the States to the western territory had been ceded to the United States, with the exception of the claims of North Carolina and Georgia and the unique claim of Connecticut to the Western Reserve. Congress had already, in the exercise of a power which is inherent in the power to acquire territory, instituted a government for the Northwest Territory, by the great Ordinance of 1787, adopted while the Convention was sitting in Philadelphia. All of these facts were familiar to the members of the Convention.

The principal power vested in Congress by this Section 3 of Article IV is the power to admit new

States into this Union. In order that this might be accomplished, so far as the territory then within its jurisdiction was concerned, it was further provided that the unappropriated lands should be disposed of, consistently with the prior action of Congress and the cessions to the United States. The use of the words "territory or other property belonging to the United States," although they must of necessity be held to include after-acquired property, show that the word "territory" was there used in its proprietary sense, at least in part if not entirely. It was certainly not meant that Congress should have the power of alienating its sovereignty and jurisdiction over this territory and its inhabitants, except by admitting new States into the Union and to the extent implied by such admission.

The primary object of the Constitution was to establish a form of national government, and it is hardly to be suggested that its framers were ignorant of the principle that the power conferred upon the Government to carry on war and make treaties did include the power to acquire sovereignty over new territory and the necessary right and duty to govern it. The clause under discussion, while recognizing a power of care and disposal which necessarily inheres in ownership, recognizes also the obligation created by the deeds of cession and their acceptance. It is in reality a limitation upon that power in two important respects: first, that the obligation resting upon the Confederation to dispose of the soil for the purpose of creating new and equal States should still be binding on the new Government; and second, that the equality of the new States with the other States

should not be affected by the fact that the United States owned vacant lands within their borders.

The history shows that the word "claim" is used in the sense of proprietary interest as well as governmental power, "as well of soil as jurisdiction," and that it never could have been in the minds of the framers of the Constitution that the ownership of the soil by the Federal Government within the States could interfere with their jurisdiction over their own internal affairs. It is safe to say that the Constitution would never have been adopted if it had been supposed that the Federal Government could exercise any governmental powers within the States merely because of its ownership of lands situated therein. It may be conceded that the power of governing the territories was meant by some of the framers, especially by the originator of the clause in question, Gouverneur Morris, as he afterward asserted, to be included in it; but never until now has it been seriously contended that it gave additional governmental powers to the Federal Government in States containing public land.

After reviewing the history of the cessions of their claims by the various States, President Jackson, doubtless with the assistance of Senator Benton's great learning, in his Message to Congress of December 4, 1833 (Messages of Presidents, III, 61), said :

"By the facts here collected from the early history of our Republic, it appears that the subject of the public lands entered into the elements of its institutions. It was only upon condition that those lands should be considered as common property, to be disposed of for the benefit of the United States,

that some of the States agreed to come into a 'perpetual union.' The States claiming those lands acceded to those views and transferred their claims to the United States upon certain specific conditions, and on those conditions the grants were accepted. These solemn compacts, invited by Congress in a resolution declaring the purposes to which the proceeds of these lands should be applied, originating before the constitution and forming the basis on which it was made, bound the United States to a particular course of policy in relation to them by ties as strong as can be invented to secure the faith of nations.

"The constitution did not delegate to Congress the power to abrogate these compacts. On the contrary, by declaring that 'nothing in it shall be so construed as to prejudice any claims of the United States or of any particular State,' it virtually provides that these compacts and the rights they secure shall remain untouched by the legislative power, which shall only make all needful rules and regulations for carrying them into effect. All beyond this would seem to be an assumption of undelegated power."

When, therefore, the Constitutional Convention coupled in Section 3 of Article IV with the power of Congress to admit new States into this Union, a provision that Congress should have power to dispose of and make all needful rules and regulations respecting the public land, with an express proviso added thereto that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State," this was in recognition

of the duty of Congress to carry out the terms and conditions of the cessions made to the United States by the original States, and to dispose of the land for the purpose of creating new States thereon, which should have "the same rights of sovereignty, freedom and independence as the other States."

The use of the words "rules and regulations" is significant as implying a power of less degree and more ephemeral than the power of making laws. Furthermore, the words "claims of any particular State" referred primarily not to the yet unceded claims of North Carolina and Georgia to western territory—which it was understood at that time should be conveyed to the United States,—but to the claims of the unborn States to the same rights of local self-government as were inherent in and had been retained by the original States. This is shown by the debates in the Convention, even though it were not to be clearly inferred from the whole tenor of the Constitution, and from the acceptance by the United States of the deeds of cession containing this requirement. For instance, Mr. Randolph said (*Documentary History of the Constitution*, Vol. III, page 308) : "Congress have pledged the public faith to new States, that they shall be admitted on equal terms. They never would, nor ought to accede on any other." And when the proposition of Mr. Madison to confer additional powers on Congress, among them the power "to dispose of the unappropriated lands of the United States," and "to institute temporary governments for new States arising thereon," was referred to a Committee on August 18, 1787, Mr. Rutledge for the committee reported the

following recommendation on August 22 (Documentary History of the Constitution, Vol. I, page 144) :

“And to provide, as may become necessary from time to time, for the well managing and securing the common property and general interests and welfare of the United States, in such manner as shall not interfere with the Governments of individual States in matters which respect only their internal police, or for which their individual authorities may be competent.”

Although this recommendation of the committee was not formally and in so many words embodied in the Constitution, its spirit runs between the lines, and affords a keynote for its interpretation.

Moreover, this attempt of Mr. Rutledge to state in a brief sentence the spirit and purpose of the Constitution, while it was in the process of formation, coincides exactly with the construction afterward affixed to it by his illustrious successor, Chief Justice Marshall.

In one of the early cases involving the construction of the Constitution, *Gibbons v. Ogden*, 9 Wheaton, 1, 195, a statute of the State of New York, which granted to Fulton and Livingston for a term of years an exclusive right to navigate all the streams in that State with steamboats, was held unconstitutional and void, because it interfered with the power exerted by Congress to regulate commerce among the States, and because the word “commerce” was held to comprehend navigation. In that case the great Chief Justice said, and his saying is as true today as when it was first written :



"The genius and character of the whole Government seem to be, that its action is to be applied to all external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of government."

Even before the adoption of the Tenth Amendment this was the construction placed upon the Constitution as a whole by its framers and by the people who adopted it. No stronger evidence of this can be found than in the expressions of Alexander Hamilton and James Madison in the *Federalist*, and none entitled to higher respect. In *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 627, Chief Justice Fuller said:

"In our judgment, the construction given to the Constitution by the authors of the *Federalist* (the five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty-making power) should not and cannot be disregarded."

In No. 78, in discussing the power of courts to pronounce legislative acts void, because contrary to the Constitution, Hamilton says:

"There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, con-

trary to the Constitution can be valid. To deny this would be to affirm that a deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."

And again in No. 32, he says:

"An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had and which were not, by that Act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases: Where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."

And again at page 250, in the same number, he says:

"The necessity of a concurrent jurisdiction in certain cases results from the division

of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We find, then, that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced, and refutes every hypothesis to the contrary."

Madison says, in No. 14 of the Federalist :

"In the first place it is to be remembered that the General Government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity. Were it proposed by the plan of the Convention to abolish the governments of the particular States, its

adversaries would have some ground for their objection; though it would not be difficult to show that if they were abolished, the General Government would be compelled, by the principle of self-preservation, to reinstate them in their proper jurisdiction."

Again, in No. 38, Madison says:

"The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."

And, in No. 45, he says:

"The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people *and the internal order, improvement and prosperity of the State.*" (Italics are ours.)

It was precisely this power of internal police, of local self-government, of residuary and inviolable sovereignty, of eminent domain in a broad sense, reserved by necessary implication in the very form and nature of the Constitution, that was further expressly protected by the Tenth Amendment.

In discussing this Amendment in the case of *Kansas v. Colorado*, 206 U. S. 46, 90, in connection with this very question of the exclusive power of the States to control the appropriation and use of their waters for all purposes except navigation, Justice Brewer said:

"This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

And after quoting the second paragraph of Section 3, Article IV, he says, page 89:

"The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words 'territory or other property.' It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant

to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits."

The only instances in which exclusive legislation is conferred upon Congress in connection with any land are those specified in Section 8 of Article I, namely, the proposed District of Columbia, the cession of which by particular States and the acceptance thereof by Congress were contemplated as conditions precedent, and "all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

So jealous was the prevailing sentiment in favor of preserving the autonomy of the States, that even for those purposes of the Federal Government, necessary to the performance of its powers and functions, jurisdiction over the particular tracts of land was not to pass from the States without their consent. There was strenuous objection in the Convention even to this clause. That portion relating to the seat of government was agreed to *nem. con.*; but on the residue, in the language of Mr. Madison: "Mr. Gerry contended that this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the General Government." (Doc. Hist., Vol. III, 676, 677.)

If a power of general legislation is sought to be derived from the ownership of the soil, such legisla-

tion by Congress would be exclusive and supreme, under the Constitution, and the argument in favor of it, therefore, refutes itself, because Congress is expressly limited in the exercise of such exclusive legislation to the governmental uses and functions above mentioned, and to the places so purchased with the consent of the particular States in which they are situated.

The power to provide for its own internal improvement has been thought to be so exclusively a matter of State jurisdiction, that the power of the Federal Government to lend its aid in this respect has been often seriously doubted, and strenuously disputed. But if the powers asserted by the Federal Government in this cause and others should be maintained, the power to control the internal affairs of a State through the ownership of land, to direct how its public uses shall be established and regulated, under what tenure and for what period they shall be held, and by whom they shall be operated, with the power to levy arbitrary and unlimited taxes upon them, all because and only because such public uses appear to have some connection with the public land, the result would be that the governments of the public-land States would be paralyzed, their equality with their sister States would be irretrievably lost, and the Union of the States, as our fathers founded it, would become a thing of the past. In the terse and forceful language of John Fiske (*Critical Period of American History*, 239) :

"If the day should ever arrive (which God forbid!) when the people of the different parts of our country shall allow their



local affairs to be administered by prefects sent from Washington, and when the self-government of the States shall have been so far lost as that of the departments of France, or even so far as that of the counties of England,—on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever.”

When Congress, in the exercise of its political discretion and its constitutional power, admits a new State into the Union, it becomes a State of the Union. Its *status* in the Union and the extent of its reserved powers are determined and defined solely by the Constitution. No act of Congress can enlarge or diminish these powers of a State, or interfere with their exercise. And, on the other hand, in the language of Justice Brewer, in *Kansas v. Colorado*, *supra*:

“While arid lands are to be found mainly, if not only, in the western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen.”

The admission of a new State into the Union, *ipso facto*, without any congressional grant, without any formal conveyance, and without even the mention of any land, operates to transfer the title to the beds of navigable waters, theretofore vested in the United States, within the boundaries of the State, so that

such title is no longer subject to disposition by Congress. Thereafter the control of the waters within a State for all purposes except navigation becomes and remains vested in the State. The same is true of all public uses within the State and the necessary occupancies of land in connection therewith, including means of public travel, traffic and communication, as well as all places dedicated to the use of the public, or of the State, or of its municipal bodies, as distinguished from places reserved or dedicated to some particular Federal use. And the underlying reason is the absolute equality of all the States of the Union and their entire and exclusive, undelegated and reserved jurisdiction over their purely internal affairs.

*Pollard, et al., v. Hagan, et al.*, 3 How. 212;

*New Orleans v. United States*, 10 Pet. 662;

*Martin v. Lessee of Waddell*, 16 Pet. 367;

*United States v. Railroad Bridge Co.*, 27  
Fed. Cas. 686, 6 McLean 517;

*United States v. City of Chicago*, 7 How.  
185;

*Ft. Leavenworth R. R. Co. v. Lowe*, 114  
U. S. 525;

*Van Brocklin v. Tennessee*, 117 U. S. 151;

*Ward v. Race Horse*, 163 U. S. 504;

*Geer v. Connecticut*, 161 U. S. 519.

"In the Territories of the United States," as said by Justice Gray, in *Simms v. Simms*, 175 U. S. 162, 168, "Congress has the entire dominion and sovereignty, national and local, Federal and State, and has

full legislative power over all subjects upon which the legislature of a State might legislate within the State; and may, at its discretion, intrust that power to the legislative assembly of a Territory." But when a new State is admitted into the Union, so much of the sovereignty or governmental power previously held by the United States in respect to the territory embraced within the new State as belongs to the original members of the Union under the Constitution in respect to the territory within their boundaries, is irrevocably ceded or granted to the new State by virtue of the act of admission; and, as a part of the sovereignty so ceded, there passes to the new State such ownership and power of control and disposition as under our system of law a State may exercise in respect to navigable waters and the lands beneath them and all other things capable of being converted into property by authorized appropriation but not yet having been actually appropriated or become private property.

The new States, therefore, by virtue of their admission into the Union and acquisition of such share of sovereignty as belongs to members of the Union, immediately acquire, as an incident of their sovereignty, not only the title to the beds of navigable waters, subject to the powers delegated to Congress by the Constitution, but also a quasi-ownership and governmental power to provide for the appropriation or other disposition of all unappropriated waters within their boundaries. And although these rights partake of a proprietary nature, and for that reason it may be argued that an act of Congress is necessary to transfer them to the new State, yet the act of ad-

mission is an act of Congress, and, as a necessary consequence under the Constitution, does operate to transfer such rights to the new State even more effectively than a specific Act of Congress purporting to grant the same.

The same reason applies to all those uses and occupancies which the local legislatures declare to be public uses, governmental control over which becomes vested in the new State upon its admission into the Union. It was upon these broad principles of our fundamental law that the Court, in *United States v. Railroad Bridge Co.*, 6 McLean 517 (1855), refused to enjoin the construction of the railroad across the Mississippi River and an abandoned military post on Rock Island, where the only authority claimed by the company was that of the local law. The case was argued by the Attorney General of plaintiff, and Justice McLean was on the Circuit Bench rendering the opinion. The fact that no appeal was taken from that decision under the circumstances should give it almost equal weight with a decision by this Court, and it should be controlling in this case.

Even if this very vital right to control the use of its waters were a privilege granted by Congress, instead of being, as it is, a right of the State under the Constitution, it would follow of necessity that there should go along with the right to appropriate and use the water the incidental right of way over the grantor's land, without which the principal thing granted could not be enjoyed. In the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 213:

"The grant of the privilege is an idle, empty form, conveying nothing, unless it

convey the right to which the privilege is attached, and in the exercise of which its whole value consists."

In the case of *Werling v. Ingersoll*, 181 U. S. 131, it was held that the grant of alternate sections of land to the State of Illinois along the line of a proposed canal, as an aid to the construction of the canal, granted by necessary implication a right of way through the reserved sections, and also that "of course a tow-path would be added." The question in the case was whether the tow-path claimed by the plaintiffs in error, agents of the State, covered ninety feet on each side of the canal, reserved from sale under an earlier Act of Congress, or seventeen feet on each side as actually occupied and used under a later Act. It was held that the earlier Act had been abandoned by both parties, that all rights were acquired under the later Act, and that the implied right of way extended to the land necessary to be used for the canal of the width contemplated, including the actual tow-path, seventeen feet wide on each side of the canal.

The decision in the case of *Kansas v. Colorado*, 206 U. S. 46, dismissing the petition of intervention of the United States, definitely settles the point that its authority over waters is limited to what Congress may deem necessary for the preservation and improvement of their navigability. For this purpose its power is supreme, and when exerted it is exclusive. When, as in the case of *United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, Congress does appropriate and dedicate to the uses of commerce one of our navigable streams, the Federal Government is under no

obligation to make compensation to the riparian owner, whether State or private individual, for the use of the water or submerged land, for the reason that the title thereto is held in subordination to the exercise of this paramount power of Congress, and that there is no "taking," in the sense in which that word is used in the Constitution, when Congress creates over the property an easement which it was always within its power to create, and to which the property was always subject. In like manner, and by an absolute parity of reasoning, when a State is admitted into the Union, all the lands within its borders, including beds of streams and other waters, become subject to its jurisdiction for local purposes, and when a right of way for some public use is established over vacant public land in the State, there is no "taking," but merely the exercise of a governmental power vested in the State.

In other words, the control of water by each sovereign is complete and exclusive in its own sphere and cannot be hampered by the fact that the ownership of the soil is in the other. The Federal laws on navigation are exclusive, and the local laws governing the appropriation and use of waters for all other purposes must be equally exclusive. And, as held in the case of *Kansas v. Colorado*, the United States itself, in making an appropriation of water for the reclamation of its arid lands, must, like any other owner of lands, and any other appropriator of water for any beneficial use, comply with the laws of the State governing the appropriation and use of water.

It is, of course, admitted that the United States, being a sovereign, may under the law-making power

of Congress, pass laws to protect its own property from *private* trespass and waste. The laws of the States, however, could not, if they would, deny it this protection. This is illustrated in the case of *Camfield v. United States*, 167 U. S. 518, which was an action brought under a Federal statute forbidding the inclosure of public land and for the abatement of a fence erected by the defendants thereon. We quote from the decision, at page 524 :

"It needs no argument to show that the building of fences upon public lands with intent to inclose them for *private* use would be a mere trespass, and that such fences might be abated by the officers of the Government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the government as a landed proprietor." (Italics ours.)

Also, at page 525 :

"The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all inclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor, does not authorize an act which is in its nature a purpresture of government



lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation."

Based upon the same line of reasoning and to the same effect are two other cases:

*United States v. Grimaud*, 220 U. S. 506;

*Light v. United States*, 220 U. S. 523.

Some confusion of ideas seems often to result from the use of the same word in different senses. As shown above, this is well illustrated by the use of the word "territory" in the clause of the Constitution under discussion. In the minds of the Convention this word was plainly intended to cover the soil itself which had been ceded by the original States, together with the jurisdiction (except as to the western reserve of Connecticut), upon condition that it should be disposed of for the purpose of creating new States; perhaps also to cover, in a vague way, the jurisdictional right of the United States over the already organized Northwest Territory, which jurisdictional right, at least as to the then existing territorial limits of the United States, was for all local purposes to pass to the new States which it was contemplated should be cre-

ated out of that territory, whenever they should be admitted into the Union; and perhaps also to cover the jurisdictional right over any after-acquired territory which would naturally and inevitably follow its acquisition.

Confusion may also arise from the words "police power," used in the foregoing citation. All that is meant by those words, as shown by the context, is their literal signification, governmental power; all that can be inferred from that case and opinion is that the governmental power of the United States to protect its own property from private waste or trespass must be so exercised as not to interfere with the police powers of the State in which such property is situated, that is to say, the governmental powers of the State over its internal affairs reserved to it by the Constitution. The words are not there used in the somewhat more technical, although undefined, sense as being the power of the State which is sometimes exercised for the general welfare of its inhabitants over such matters and in such a manner that the private rights and property of individuals must yield without compensation even though they suffer, or which may to some extent touch upon without impairing the powers of the Federal Government itself.

The words "police powers of the several States," as used in the passage quoted, simply mean the constitutional powers of the States over their internal affairs. It is this general power to which reference is made in the case of *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 592, where the court says:

"We hold that the police power of a State embraces regulations designed to pro-

mote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

In that case, moreover, the court held that the injury complained of—the reconstruction of a railroad bridge or culvert made necessary by the enlargement of the channel of a stream by a drainage district—was "only incidental to the legitimate exercise of governmental powers for the public good," and that the right to compensation did not attach under the Constitution.

Likewise, in the case of *Manigault v. Springs*, 199 U. S. 473, this power of the State exercised for the purpose of reclaiming swampy, overflowed and infertile lands in South Carolina, is referred to as "defensible in its broader meaning of providing for the general welfare of the people." The court refused in that case to enjoin the erection of a dam authorized by an Act of the Legislature, leaving the question of damage to the plaintiff, if any, to be thereafter determined.

The case of *Hudson County Water Co. v. McCarter*, 209 U. S. 349, in which this Court affirmed a decree of the New Jersey Court of Chancery, enjoining the company, upon the complaint of the Attorney General of the State, from diverting the waters of the Passaic River outside of the State, was rested not upon any proprietary interest of the State in the submerged land under navigable waters or in the water itself, but upon the police power of the State, and in the synonymous language of the Court, "*the constitu-*

*tional power of the State to insist that its natural advantages shall remain unimpaired."* Has not the State an even greater right to insist that its natural advantages, so far as all uses declared by its laws to be public uses are concerned, shall be developed and used under its own laws?

As Chief Justice Hayt said in *White v. Highline Canal Co.*, 22 Colo. 191, 195-6:

"The right to the use of water in the arid region is among the most valuable property rights known to the law."

And, referring to certain statutes of the State regulating the distribution of the water, the learned Judge says:

"Although it is difficult to define the boundaries of the police power of the State, such regulations as those prescribed by the statute under consideration are by the decisions of the highest courts declared to be within such power."

Clearly, therefore, the right to control the appropriation and use of their waters for all beneficial purposes except navigation, is one of the police powers of the State, reserved to it by the Federal Constitution. The proprietary right of the Federal Government to lands within a State must yield to the governmental power of the State, and it is beyond the power of Congress to override State laws on the subject. That which is inferior must yield to that which is superior. Any encroachment upon this right of the States would lead to its ultimate extinction in all

cases where rights of way over public lands are involved, and thus establish a government within a government, and destroy the constitutional balance of power between the two sovereignties to the untold detriment of each and all, the Union and its component parts.

There is no question here concerning the power and duty of Congress to dispose of the soil. That is a political matter, to be controlled by the people in the exercise of their right to vote for members of Congress. The question here concerns the jurisdiction over the soil for local governmental purposes. Since the foundation of the Government, even before the adoption of the Constitution, this power has been exercised without let or hindrance by the local governments. Even in the Territories, under their organic acts, providing for local self-government, which have generally followed the lines of the Ordinance of 1787, such matters as easements over the public lands for highways, canals, and other public uses, have been regarded as "rightful subjects of legislation."

The Federal Government has always parted with its title to the soil, subject to such easements, without deduction in price or acreage. This fact alone should be enough to prove the lack of damage by reason of such easements. Not only is no damage done thereby, but without such easements the country could not have been settled or developed at all and the lands would have remained "waste and unoccupied," and utterly worthless. It is the settlement and development that has given the lands whatever value they have, and the recognition of these public rights of way

has been an aid to the disposition of the lands and a necessary condition to their settlement.

The States, and even the Territories, have always claimed this right and not only has Congress never denied it nor, until within very recent years, have the Executive Departments questioned it, but with an apparent liberality Congress has made countless grants of land to aid in the construction of canals, highways, railroads, as well as for educational and for other public purposes.

Should not absence of judicial authority against a right which has been claimed and exercised since the Government was founded, upon faith in the validity of which great commonwealths have been developed and established in a previously uninhabited country and admitted as States into the Union; laws of property enacted as part of their jurisprudence, and vast and varied interests vested thereunder,—should not absence of such authority be construed rather in favor of than against the existence and validity of such right?

Hitherto, all conflict between State and Federal authority respecting these matters has been avoided. Here, for the first time in our history, such a conflict has arisen and become the subject of litigation in this Court. Shall it be said that an Act of Congress is necessary to reconcile the conflict? The defendant claims a vested right to the use of water and to easements over the public land under the laws of the State of Utah. The plaintiff claims that, under the laws of the United States, governing the disposition of the public lands, there not only can be no such vested rights as claimed in this case, but that there can be

only a permission revocable at the discretion of the Secretary of Agriculture.

The State is vitally interested in this question. Four-fifths of its area is still public land. If this particular use of public land can be controlled, taxed and prohibited, simply because a portion of it happens to be on the great untaxed public domain, so may all other public uses similarly situated within the State, be controlled, taxed and prohibited. May we not earnestly assert that it is a conflict which never should have arisen, and confidently hope that this Court will in this cause set it forever at rest by sustaining the State of Utah, and also her sister States, in the possession and exercise of their lawful and constitutional powers?

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## II.

### *The Statutory Phase of the Question.*

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- (a) *The Ninth Section of the Mining Act of July 26th, 1866, commonly referred to as the Act of 1866.*

We respectfully submit that the decree of the District Court in this case should be reversed, and an order entered requiring the case to be dismissed, on the broad ground that the police power of the State to declare what uses of property within its jurisdictional limits are public uses, and to provide by its own laws for the creation, continuance and regulation thereof, is supreme and exclusive, and in its exercise



is limited solely by the Constitution of the United States, construed in its true light as having established a dual form of government, under which the powers reserved to the States, and not prohibited to them by that instrument, are of necessity independent of any control by Congress, and are not to be affected or in any way limited by the fact that the Federal Government, as a trustee proprietor, still holds the title to vacant land within a State. To hold otherwise, and to permit the Federal Government to exercise governmental powers over the internal affairs of the States, because of its ownership of land or for any other reason, would place the public-land States upon an unequal footing with the other States, and rend the very fabric of our Union.

However, if the concession be made, purely *arguendo*, that the consent of the Federal Government is essential to the establishment within a State of a public use which in any manner involves a right of way over public land, there are many Acts of Congress relating to the particular use involved in this case, namely, rights of way for the use of water, recognizing that it is a matter which is subject to the control of the local law, and intended to aid and not to hinder the operation of the local laws on the subject, and so to encourage the settlement and development of a new and undeveloped country. It is true that in the Territories this local control is in legal contemplation subject to the paramount power of Congress, not so much because the Federal Government happens to own land situated therein as because its legislative authority under the Constitution is supreme in the Territories; but it is not, and cannot be, so in the States.

The genesis and growth of the unexampled and unwarranted assumptions of Federal authority within a State, of which this and other similar cases are the culmination, will be explained in the following pages. The fact that the Federal Government originally held not only the title to the soil but also the jurisdiction over the vast, unpeopled territory of the western States, and that until within recent years many of the local governments were under its paternal guidance and control as Territories, naturally resulted in a great mass of congressional legislation intended to promote the settlement and development of this territory. Grants were made for various kinds of public uses, and properly so. Generally, however, care was taken by Congress to distinguish between its powers in a State and in a Territory. But the use of the word "grant" in railroad right-of-way Acts, as applied not only to the grant of lands in aid of construction, but as to the right of way itself, and many other Acts relating to public roads and highways and other public uses, naturally led to the inference that such a grant was necessary, from which inference it would naturally follow that the power to grant implied the right to withhold, or to impose conditions on the grant. Such arbitrary power, however, as would be implied in these inferences, has never been attempted to be exercised by Congress. Its whole action, with perhaps some minor exceptions, has been intended to encourage the settlement and development of the country. But, as will be seen, the Executive Departments have placed narrow constructions on the Acts of Congress on these subjects, which has resulted in additional legislation by Congress intended to correct such

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errors, only to be followed by further illogical and narrow constructions by the Executive Departments. For instance, the Department having held that a certain Act did not confer upon the Secretary authority to do certain things, Congress has passed Acts expressly conferring that authority; and, strange as it may seem, the Departments have immediately construed this new warrant of authority to do certain things as implying a warrant of authority to refuse to do them, or to impose terms and conditions on their consent. Thus departmental action, under a misconstruction of the law, has usurped the functions and authorities of the States. The constitutional powers of the States have been lost sight of; the basis of their constitutional rights has been sought in their own constitutions and laws on the one hand, or in Enabling Acts and other Acts of Congress and in the action of the Executive Departments on the other, instead of in the Constitution itself, which alone constitutes the powers of the General Government and delineates the boundaries between those powers and the powers of the States.

There have always been in Congress and no doubt will continue to be men who have sought to extend the power of the executive and legislative branches of the Government beyond the limits prescribed by the Constitution. But, fortunately, in so far as the subject here under consideration is concerned, there have been, up to the present time, sufficient members who were opposed to such extension of power to keep the enactments of Congress from going beyond constitutional limits; and we find, from a study of the history of legislation upon the subject as well as of the legislative enactments themselves, that in no instance has

Congress, in the final passage of any Act, endeavored to encroach on the constitutional rights of the States to control their own internal affairs and development. As shown in the following pages of this brief, such encroachment as we here complain of has been brought about by administrative misconstruction of existing legislation.

The first legislation of Congress on the subject is contained in the Ninth Section of the Act of July 26th, 1866, now Section 2339 of the Revised Statutes, which reads as follows:

“Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.”

The most cursory reading of this section shows that it was not so much intended to grant anything as to recognize the existence, operation and validity of the local laws on the subject. It speaks of rights to the use of water, acquired by priority of possession under the local laws, as vested rights; solemnly declares that the possessors and owners of such vested

rights shall be maintained and protected in the same, and acknowledges and confirms the right of way for the construction of such ditches and canals, prospectively as well as retrospectively.

In order to comprehend the full significance of this Act, it must be borne in mind that a large portion of the arid region of the west had been acquired from Mexico in 1848; that the pioneers settled in Utah in 1847; that California was admitted into the Union in 1850, without prior Territorial status, as a free State, and as a part of the great compromise of 1850; that Oregon was admitted into the Union in 1859, and Nevada in 1864, and that in the process of settling and developing this region, and in consequence of the absolute necessity of the use of water for mining, agricultural, manufacturing, domestic and other purposes a vast amount of local laws and decisions on the subject had arisen, differing in different localities. These were the local laws, embodied almost entirely in decisions of State and Territorial courts, which the Act of 1866 recognized as controlling the acquisition of rights to the use of water and easements therefor on the public land in both the States and the Territories. While differing in some minor respects, the essential principle of these laws was that such rights are acquired by appropriation under the local laws, and not by grant, and their sum and substance is, that beneficial use is the basis, the measure and the limit of the right.

It should be borne in mind that the only practical way to use water for any of these purposes was to divert it from its natural beds and channels and carry it by artificial channels to the place of use; and, inas-

much as practically all the land in this region was then, as a large proportion still is, public land, that this right of appropriation necessarily involved the use of easements over such land. The very definition of a water right as a diversion and application to beneficial use contained, therefore, this element of easement, since the place of diversion and the place of use were separated by greater or less distances, and often by many miles.

The debates in Congress on the Act of 1866 dealt almost entirely with the rights of miners to the mines, and not with vested rights in ditches and canals on the public domain. The latter were recognized without question, perhaps because there was an unexpressed consciousness in the minds of the legislators that no power had been delegated to the Federal Government to control the use of water for any purpose except navigation; that, in the same manner and for the same reason that the title to the land covered by navigable waters is held subject to the paramount easement of navigation, so the title to the public land not required for Federal uses must be held and disposed of subject to the operation of the local laws governing the appropriation and use of water for all beneficial purposes except navigation; and that the Territories, being similarly situated, and being prospective States, should be placed upon the same footing in this respect. So far as the States were concerned, the 9th section of the Act of July 26, 1866, was, therefore, merely declaratory, and its only legal effect was to grant to the Territories the same powers over their waters as were inherent in the States.

And, it should be remarked in passing, the use of water and easements over the public land in the arid

States was a prime necessity to their settlement and to their political existence, and there is a fundamental distinction between an easement and an interest in the soil. Indeed, in the arid region, without the existence of such easements, the public land could not have been occupied, and the power of disposal would have remained ineffectual and as barren as the lands themselves.

The burning question in 1866 was not so much what rights should be conceded to the owners of ditches and canals, although property of enormous value was dependent upon and inherent in such rights, but what rights should be conceded to the miners, whose property was of far greater value and of far more doubtful nature. Much light is thrown on the actual conditions existing at the time, both with respect to the mines and the water, by the debates in Congress, and the following extracts are believed to be fairly illustrative:

House, June 13, 1866, page 3141, Globe—Mr. Higby:

"It is a fact well known to this House that the mineral lands have not been in the market for sale,—the right of eminent domain having been held by the Government of the United States. Yet for seventeen years the people of the United States have been permitted to go upon those lands for the purpose of extracting the precious minerals which they contain. In order to work those mines with success it became an absolute necessity that water should be carried at great expense through artificial channels over the public lands.



"And up to this time money to the amount of millions of dollars has been invested in the construction of these canals and flumes. I have before me the report of the Surveyor General of the State of California, in which, among other things, is given the number of miles of ditches and flumes and canals which have been constructed in that State. And on footing up what has been reported to him we have more than thirty-five hundred miles of canals and ditches. I know that all are not embraced in that report. I know that in the county of Amador, the county adjoining the one in which I reside, there are over one hundred miles of ditches, of which none is included in that report. And the estimate of the value of these ditches there given is too low, because of the fall of value of property in the mining district. I know that millions have been expended in the construction of these ditches and canals, and millions are yet to be extracted from the public lands."

The bill originally was limited to California, but an amendment included Oregon and Nevada and finally upon the motion of Mr. Taylor, it was made applicable to the Territories as well. Mr. Taylor said:

"It seems to me that if this measure be right for the States it is equally proper for the Territories, and that the latter should be embraced in the same bill."

Mr. Higby stated the purpose of the bill to be—

"to extend the same security that has always been extended to this kind of property under the rules and regulations of the miners and the legislation of their several

States; so that if this land should come into the market and be sold, the buyers shall respect the right of way over the land secured to these parties."

Globe, July 23, 1866, page 4050, Mr. Julian said :

"Why, Mr. Speaker, the Constitution of the United States declares that Congress 'shall make all needful rules and regulations respecting the territory or other property of the United States.' What right has the Congress of the United States to abdicate its jurisdiction over this great domain? What right has the central government, owning these lands in fee, to say to these embryo communities in the far west that it gives up to their absolute discretion and management these great magazines of mineral wealth? Why, sir, it would be a most wanton recreancy to the grand trust devolved upon us if we should do so."

July 23, 1866, page 4053, Globe, Mr. Ashley, of Nevada, said :

"In 1850 it was proposed to legislate upon this subject. A discussion took place in the Senate, but ultimately nothing was done, on the ground that Congress was not sufficiently informed, and it would, therefore, leave the people in the mining region to get along as best they could. Accordingly they were let alone, and for seventeen years they have been going along under their local rules. Rights of property have grown up. Men have spent seventeen years of their lives there, and invested their capital. Their future hopes are all centred in that country.

They have considered themselves safe heretofore. Sir, we ask the gentlemen not to put us off. We want security. We have lived there almost a generation, and is it too much that we come here and ask you to pass this measure? Are we to be charged with being impudent because we are earnest and want you to believe us? We, as American citizens, ask that we shall have the same rights as you have. You own your property here—we ask that the United States shall give us the same title to ours. I know the response of every true man is that we are right. Why should we be lessees and tenants always? Is that the system that the American Government wishes to establish—that all the rest of you may own your homes, but we who delve in the earth for the precious metals shall be tenants and serfs always? I ask the House now to say 'No.'

"Heretofore the United States has had no system in regard to the mineral lands. Now we propose that the people shall hold these lands under their own local rules. \* \* \* It is objected to the bill that we are to settle that question (of prior possession) in our local courts. I tell you all our rights in these mining regions depend upon local rules and customs, and they must be settled there. We will trust to a jury of our own countrymen and to the mode of procedure in our courts, our interests, our homes, our whole possessions, much more freely and with more confidence than we will trust them to any man who happens to be appointed to political position in the government, whether he be commissioner in a land office or Secretary of the Interior, or a clerk who may be deputed to decide our disputes."

June 18, 1866, *Globe*, Senate, pages 3225, 3226, Senator Stewart said, in referring to Fremont's mining bill upon the admission of the State of California:

"Mr. Benton took a leading part in the discussion, and contended throughout that good policy required that the mines should remain free and open for exploration and development. Mr. Seward sustained Mr. Benton.

" \* \* \* The arguments of Senators in favor of free mining finally prevailed, and all amendments looking to sale or direct revenue were voted down and the bill finally passed the Senate, without material amendment in its original form, but failed in the House for want of time to consider it. This solemn declaration on the part of the Senate in favor of a just and liberal policy to the miners was hailed by them as a practical recognition of their possessory rights, and greatly encouraged and stimulated mining enterprises and laid the foundation for a system of local government now in full force over a vast region of country inhabited by near a million men.

"The legislature of California at their following session, in 1851, had under consideration the subject of legislating for the mines; and after full and careful investigation wisely concluded to declare that the rules and regulations of the miners themselves might be offered in evidence in all controversies respecting mining claims, and when not in conflict with the constitution or laws of the State or of the United States should govern the decision of the action. A series of wise judicial decisions molded these regulations and customs into a comprehen-

sive system of common law, embracing not only mining law (properly speaking) but also regulating the use of water for mining purposes. The same system has spread over all the interior States and Territories. \* \* \*

"I assert, and no one familiar with the subject will question the fact, that the sand plains, alkaline deserts, and dreary mountains of rocks and sage brush of the great interior would have been as worthless today as when they were marked by geographers as the Great American Desert but for this system of free mining, fostered by our neglect and matured and perfected by our generous inaction. No miner has ever doubted the continued good faith of the government, but has put his trust in its justice and liberality, traversing mountain and desert as incessantly and as hopefully as the farmer of the West has plowed his field. What he now occupies he has discovered and added to the wealth of the nation.

"The good faith of the Government (promised as it were, by the action of this Senate sixteen years ago), not only inspired enterprises and led to discoveries, the magnitude and importance of which cannot be overestimated, but in the time of the severest trials of the Union, no people were more loyal than the miners. They lost no opportunity to enlist in your armies or contribute to the support of the government. Their liberal donation to the sanitary fund was but a slight manifestation of their deep love of the Union and sympathy for its suffering heroes. The little town in which I reside contributed in gold coin over \$112,000, being at the time about thirty dollars

to each voting inhabitant, and a like liberality was displayed by the whole coast. The people are truly grateful to a generous Government, and time seems to have strengthened the tender regard they feel for their native land and their early homes. But they look with jealous eyes upon every proposition for the sale of the mines which they have discovered and made valuable. Any public man who advocates it, with whatever motive, is liable to be condemned and discarded as an unfaithful servant. The reason for this is obvious. It is their all, secured through long years of incessant toil and privation; and they associate any sale with a sale at auction where capital is to compete with poverty, fraud and intrigue with truth and honesty. It is not because they do not desire a fee-simple title, for this they would prize above all else; but most of them are poor and unable to compete with capitalists and speculators, which the adoption of any plan heretofore proposed would compel them to do; and for these reasons the opposition to the sale of the mineral lands has been unanimous in the mining states and territories. \* \* \*

"Your committee, feeling that the time has arrived when the prosperity of the country requires a settlement of this question, have carefully prepared a substitute for the bill introduced by the Senator from Ohio, which they believe is free from most of the objections hitherto urged to a sale of the mines. \* \* \* It continues the system of free mining, holding the mineral lands open to exploration and occupation subject to legislation by Congress and local rules. \* \* \*

"It is also in harmony with the rules of property, as understood by a million men, with the legislation of nine States and Territories, with a course of judicial decision extending over near a quarter of a century and finally ratified and confirmed by the Supreme Court of the United States. \* \* \* In short, it proposes no new system, but sanctions, recognizes and confirms a system to which the people are devotedly attached, and removes a cloud of doubt and uncertainty which recently has depressed and retarded the growth of our mining communities."

And at page 3228:

"A nation of freeholders is a nation of sovereigns, but a nation of tenants is a nation of slaves. Let not our free system of mining be degraded into miserable monopolies or disastrous confusion, but let it be confirmed, enlarged and perfected, and the great national bank of redemption in the west will never refuse specie payment."

At page 3236, Mr. Sherman said:

"I think it is the interest of the United States to get rid of the mineral lands of the United States, to get them into the hands of private individuals. \* \* \* I might produce the opinions of Mr. Benton, Mr. Clay and many of the most eminent statesmen of America to show that the title to the mineral lands is of no benefit to the United States."

Section 2340 of the Revised Statutes was Section 17 of the Act of July 9, 1870, and that it was recog-



nized as declaratory, in providing that patents should be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection therewith, is shown by its legislative history. On March 17, 1870, Globe, page 2030, Mr. Niblack offered an additional section to the bill identical with Section 17 (now Section 2340, U. S. R. S.), with the exception of the omission of the word "preemption," and said:

"I am not sure that the amendment which I offer is necessary for the protection of the rights which it is intended particularly to secure, but I am quite sure, and upon that point I have had some consultation with gentlemen interested, that it will do no harm. Out of abundance of caution, therefore, I have sought the opportunity to offer this amendment, and I trust it will be adopted."

"Mr. Sargent. The object of the amendment is unquestionably right."

"The amendment was agreed to."

Thus Section 17 of the Act of July 9, 1870 (Section 2340, U. S. R. S.), was confessedly passed out of abundance of caution, and was merely declaratory. The appropriation of water and the incidental rights of way over the public land were vested rights, to which the conveyance of Federal title was necessarily subject.

There can be no doubt that if the land here involved had been conveyed by the Government to a private person, or to the State of Utah, without any reservation of the easement, the laws of the State would have protected the owner thereof against the

grantee of the Government. The patent itself would have recited that it was "subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts." The laws of Utah have for many years recognized that water may be appropriated for the purpose of generating electric power, as well as for all other beneficial uses.

The reservation in patents above quoted was adopted by the Department of the Interior not long after the passage of the Act of July 9, 1870; and the contemporary construction placed upon this legislation (Sections 2339, 2340) in the following letters of the Commissioner of the General Land Office is illuminating, and shows that it was at that time regarded by the Executive Department in charge of its administration in its true light as a legislative interpretation of the letter and spirit of the Constitution, and as subordinating the proprietary right of the Federal Government to the police power of the State, and thus avoiding any conflict of authority.

*"Decisions of the Commissioner of the General Land Office, 1874 (Copp)," pages 24-25:*

"WATER RIGHTS PROTECTED BY LOCAL LAWS.

Department of the Interior,  
General Land Office,  
Nov. 23, 1869.

Mr. R. L. M. Camden,  
326 Walnut St., Phila., Pa.

Sir:

Referring to your letter of the 22nd, concerning a ditch or canal owned by you in

California, submitting the query whether your rights to the property are not fully protected by the ninth section of the Act of July 26, 1866, commonly called the Mining Act, I have to state that the statute referred to is the result of a policy on the part of Congress, seeking to harmonize the right of sovereignty of the soil, inherent in the General Government with certain possessory rights growing out of the peculiar condition of things found in the mining States and Territories of the west, which have become engrafted upon the public lands through the operation of local customs and legislative enactments. Its object is to furnish a method of dealing with these conflicting interests so as not to impair the validity of either. It recognizes and preserves such possessory claims as are valid and effective under local regulations, but it does not create them. It substantially embodies a stipulation that the General Government, in disposing of the public domain, will proceed in such a manner as to protect such rights of possession to the same as claimants may be entitled to, under such local customs, or laws, at the time of the sale by the United States. But these rights derive all their validity from local regulations, the Act of Congress imparts none. It respects those existing at the date of the sale of the public lands, but superadds nothing to their efficiency under the local laws. Take away the regulations adopted by miner's meetings, or local legislatures, and all rights acquired under them in respect to lands remaining unsold must fail.

"If, therefore, you inquire to what extent the ninth section of the Mining Act

protects your property in certain water rights in California, or in a particular mining ditch or canal, the answer is, that in disposing of the public lands, upon which said canal is located, the United States will, under said ninth section, maintain and protect such rights in the same as have vested and accrued by priority of possession, and which at the time of such disposal are recognized and acknowledged by the local customs, laws, and decisions of the courts of California.

"In the opinion of the Commissioner, therefore, your rights in the matter of the canal are primarily regulated by the customs, laws and courts of California; and the only protection the Act of July 26, 1866, can render you, is in upholding the integrity of these so far as they may constitute the foundation of any right you may have in or to such canal, when the General Government grants the lands upon which it is located, with this addition, that during the time intervening between the passage of the Mining Act and the disposal of the land of the United States, you cannot be held as a trespasser on it in respect to any rights thus secured to you by such customs and laws of California, or decisions of its courts.

Very respectfully, etc.,

JOS. S. WILSON, Commissioner."

The multitude of decisions in both State and Federal courts, in which Sections 2339 and 2340 are treated as a protection to appropriators of water and easements in the public land under the local laws, is so great, there is such an embarrassment of riches of material on the subject, that selection is difficult.

However, reference is made to the following two cases as fair illustrations of the interpretation placed on the Act of July 26, 1866, one with reference to water rights and the other to mining claims.

In the case of *Broder v. Water Company*, 101 U. S. 274 (1879), the defendant had made an appropriation of water in 1853 by means of a canal which crossed certain lands granted to a railway company in 1862 and 1864, and other lands pre-empted by plaintiff in 1866, after the passage of the Act of July 26, 1866. The plaintiff brought an action to have the canal declared a nuisance, and for damages, and the court says, at page 275:

"As to the canal of the defendant, so far as it ran at that date through the land of the United States, this Act was an unequivocal grant of the right of way, if it was no more. As the plaintiff's right to the lands patented to him and his brother commenced subsequently to this statute, he took the title subject to this right of way, and cannot now disturb it.

"In reference to his lands held under conveyance from the railroad company, it might be a question of some difficulty whether the right was so far vested in that company before the passage of this Act of 1866, that the latter would be ineffectual as regards these lands. But we do not think that the defendant is under the necessity of relying on that statute.

"It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who

had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights, which the Government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the Act of 1866. We are of opinion that the section of the Act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

In *Butte City Water Co. v. Baker*, 196 U. S. 119 (1905), the question directly involved was a dispute between two locations of mining ground, but Justice Brewer (see page 123) quotes a portion of Section 2339, and at page 127, in sustaining the validity of local laws respecting the location of mining claims, lays down a rule of construction, which has a striking application to the question under discussion:

"Finally, it must be observed that this legislation was enacted by Congress more than thirty years ago. It has been acted upon as valid through all the mining regions of the country. Property rights have been built up on the faith of it. To now strike it down would unsettle countless titles and work manifold injury to the great mining interests of the Far West. While, of course, consequences may not determine a decision, yet in a doubtful case the court may well pause before thereby it unsettles interests so many and so vast—interests which have been built up on the faith not merely of congress-

sional action, but also of judicial decisions of many State courts sustaining it, and of a frequent recognition of its validity by this court. Whatever doubts might exist if this matter was wholly *res integra*, we have no hesitation in holding that the question must be considered as settled by prior adjudications and cannot now be reopened."

Even if the 9th section of the Act of July 26, 1866, had not placed the Territories on the same footing as the States with respect to the control of the appropriation of water, and even if the necessities of the people and the country were not recognized as the basis of law on the subject, there is strong ground for the contention that the Acts of Congress establishing Territorial government recognize this principle of local control over water for all beneficial purposes except navigation. It was always regarded as a rightful subject of legislation, even in the Territories. In this connection, it should be remembered that the right to divert water from its natural channels, to consume it, to carry it into another watershed, with the sole limitation that it shall be applied to beneficial use, is in contravention of the common-law right of lower riparian owners to a continuous flow. And if the Government were a lower riparian owner, its rights under the riparian doctrine would be infringed by such diversion independently of any question of easements over its lands for the use of the water.

The Act for the establishment of a Territorial government for Utah, approved September 9, 1850, contained the following provision, common to all Territories (see Section 1851, U. S. R. S.), I Compiled Laws of Utah, 1888, page 43:



"Sec. 6. And be it further enacted: That the legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this Act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the Legislative Assembly and Governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect."

In the very instructive case of *Stowell v. Johnson*, 7 Utah 215 (1891), in which a lower riparian owner, who had obtained title from the United States prior to 1880, was enjoined from interfering with a prior appropriation of water, it was contended that the common-law doctrine of riparian rights prevailed in the Territory, and that the Act of the Utah Legislature of 1880 with reference to water appropriations was not within the contemplation of the Organic Act, which provided that the legislative power of the Territory should extend to *all rightful subjects of legislation*. The contention of defendant was that the right of continuous flow was an incident to the ownership of the riparian soil, and that an Act of the legislature permitting water to be diverted from its natural channel for any useful purpose was an interference with the rights of the lower riparian owner, and with the primary disposal of the soil if the Federal Government were such owner. The Supreme Court distinctly

held, however, that "riparian rights have never been recognized in this territory," and that the use and appropriation of water were *rightful subjects of legislation*.

The same Act of February 20, 1880, quoted 7 Utah 221, contained the following section:

"15. All persons shall have the right of way across and upon public, private and corporate lands, or other right of way, for the construction and repair of all necessary reservoirs, dams, water-gates, canals, ditches, flumes or other means of securing and conveying water for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property."

It should be noted that the words "public lands" in this section, enacted sixteen years before the State was admitted into the Union, can only refer to Federal lands. Furthermore, this legislation, submitted to Congress in accordance with the express terms of the organic Act, and never disapproved by Congress, must be held to have had its sanction. The compensation referred to is that which is required by the Constitution for the taking of private property for a public use.

During the course of the argument in the *Kansas v. Colorado* case, by the attorney on behalf of the United States, one of the justices said:

"You constantly talk about the public lands. When you speak of the public arid lands, are you deducing from the fact that they are public lands a governmental right or power in Congress? Do you suppose if there is a hundred acres of public land in a State, the existence of that public land in the State invests Congress as a government with the power to destroy the law of the State, because it owns land in the State, which an individual would not have?" (Stenographic Report.)

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- (b) *Certain Right-of-Way Acts Subsequent to 1866. The legislation under discussion concerns easements necessary for the development of the resources of the State and for uses declared by its laws to be public uses, and does not affect the disposal of the land.*

Subsequent acts of Congress not only can, but should, be construed consistently with the fundamental principles implied in the Act of July 26, 1866. for as was said by Mr. Justice Pitney in a recent case (*Plymouth Coal Company v. Pennsylvania*, 232 U. S. 531, 546) :

" \* \* \* it is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority."

It is now our purpose to take up and discuss fully and in detail the various related Acts of Congress bearing upon the subject under consideration, subsequent to the passage of the Act of 1866, and to demonstrate by the contemporaneous departmental construction put upon said Acts that the position taken by the Departments of the Government several years after the passage of the Act of 1901 is in direct conflict with the intention of Congress as expressed in the Acts themselves, as well as in conflict with the fundamental constitutional rights of the States.

In the course of this discussion we shall consider the regulations and decisions of the Land Department, the debates in Congress, and other public records, for the purpose of showing clearly the history, the nature and the intent of all this legislation.

The following Acts of Congress will be considered in this connection :

- Act of March 3, 1877, 19 Stat., 377;
- Act of October 2, 1888, 25 Stat., at 505;
- Act of August 30, 1890, 26 Stat., at 371;
- Act of March 3, 1891, 26 Stat., 1095;
- Act of January 21, 1895, 28 Stat., 635;
- Act of May 14, 1896, 29 Stat., 120;
- Act of February 26, 1897, 29 Stat., 599;
- Act of June 4, 1897, 30 Stat., 34;
- Act of May 11, 1898, 30 Stat., 404;
- Act of February 15, 1901, 31 Stat., 790;
- Act of June 17, 1902, 32 Stat., 388;
- Act of February 1, 1905, 33 Stat., 628;
- Act of June 21, 1906, 34 Stat., at 375.

The regulations adopted by the Land Department for the administration of these Acts of Congress relating to appropriations of rights of way for canals, etc., may be found in the Land Decisions, as follows:

April 17, 1891, 12 L. D. 429;  
 March 21, 1892, 14 L. D. 338;  
 February 20, 1894, 18 L. D. 168;  
 December 23, 1896, 23 L. D. 519;  
 July 8, 1898, 27 L. D. 200;  
 September 17, 1898, 27 L. D. 495;  
 June 27, 1900, 30 L. D. 325;  
 July 8, 1901, 31 L. D. 13;  
 June 26, 1902, 31 L. D. 503;  
 March 1, 1905, 33 L. D. 451;  
 September 28, 1905, 34 L. D. 212;  
 June 6, 1908, 36 L. D. 567;  
 August 24, 1912, 41 L. D. 150;  
 March 1, 1913, 41 L. D. 532.

*The Act of March 3, 1877*, after providing in section 1 for the filing on desert lands, and a declaration of intention to reclaim the same by conducting water thereon, which of necessity implies a right of way over the public land for the conduit, contains the following proviso:

*"Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres, shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water*

actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply on the public lands and not navigable shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights."

This proviso is not only a recognition, but it is in substance a complete and accurate definition, of the arid region doctrine of prior appropriation. But it is more than this; it is a dedication of the waters on the public land to the operation of this doctrine, and of necessity a recognition of the incidental right to appropriate the easements without which the right to use the water would be unavailable.

The declaration that all unappropriated water shall be and remain free for appropriation by the public for all beneficial purposes, subject to the Federal control of navigation, is a dedication for those purposes, accepted by the western States by their pre-existing laws; and, even if the right of the States to control their waters were not protected by the Federal Constitution, such a dedication would be irrevocable.

In the case of *Hough v. Porter*, 51 Ore. 318, 98 Pac. 1083 (1909), after quoting the foregoing provision contained in the Desert Land Act and treating it as a dedication, the court says, referring to the case of *McConnell v. Lexington*, 12 Wheat. 582, at page 1095:

"But it is clear that, if a dedication can be made to the public of a spring or a stream in the manner indicated in the last

case quoted, the owner of any source of water supply may make a like dedication in that or in any other manner determined upon. The manner of making the dedication, as well as its legal effect, must be determined from the act or instrument by which it is made. In the case under consideration it will be observed that the language used is that the surplus waters of the streams and of other sources of water supply designated shall remain and be held free for the appropriation and use of the public for (1) irrigation, (2) mining, and (3) manufacturing purposes. The manner of appropriating and using the water for irrigation, manufacturing, and mining purposes was at that time and has been at all times since well understood; hence the use by the public and manner thereof is specified, meaning, when interpreted in the light of the then existing facts, the usual manner of applying it for power purposes and of diverting it by means of ditches and other systems in use for irrigation, including also the usual methods in use by miners."

The Act of May 18, 1796 (1 Stat., 468), contained a declaration, now part of Section 2476, U. S. R. S., that "All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways." Article 4 of the Ordinance of 1787 declared that certain navigable waters should be "common highways, and forever free." These declarations have been held to be dedications. For instance, it is said in *Mobile v. Eslava*, 16 Pet. 253, that "the navigable waters within this State have been dedicated to the use of citizens of the United States, so



that it is not competent for Congress to grant a right of property in the same." And in that case the right is put also upon the higher ground that under the Constitution the new States cannot stand upon an equal footing with the original States as members of the Union, "if the United States shall retain over their navigable waters any other right than is necessary to the exercise of its constitutional powers."

A typical provision on the subject of waters in the western States is the following, being paragraph 5 of Article XVI of the Colorado Constitution :

"The water of every natural stream, not heretofore appropriated within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided."

In the case of *Wheeler v. Northern Colorado Irrigation Company*, 10 Colo. 582, Judge Helm refers to the constitutional provisions of Colorado as follows, at page 587 :

"Our constitution dedicates all unappropriated water in the natural streams of the state 'to the use of the people,' the ownership thereof being vested in 'the public.' The same instrument guarantees in the strongest terms the right of diversion and appropriation for beneficial uses. With certain qualifications it recognizes and protects a prior right of user, acquired through priority of appropriation."

The parties to a dedication are the individual proprietor and the public at large. And the rule that

a statutory grant is to be construed strictly in favor of the public should inure to the benefit of the grantee when the grantee is the public. Such is the liberal rule applied to the homestead laws, which are construed favorably to the settler, as well as all beneficial statutes enacted in the general public interest, in which any construction which savors of narrowness or illiberality is at variance with the manifest purpose of the legislature. See:

*Silver v. Ladd*, 74 U. S. 219;

*Lindley v. Hayes*, 2 Black. 554.

The opinion of the court in the *Utah Power & Light Case*, *supra*, ignores this distinction. The true rule in case of such general legislative grants is stated in the case of *United States v. Rio Grande Railway Co.*, 150 U. S. 1. In that case it was held that, although the place of taking timber by railroad companies was restricted by the Act to lands adjacent to the line of railroad, the place of use was unrestricted, and the timber so taken might be used for any purpose of the railroad as an entirety. The court, on page 14, speaks as follows:

“When an Act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi-public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different

footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."

But, just as the title to the soil under navigable waters is put not only on the ground of dedication, but on the higher ground of the constitutional right of the States, so the right to easements over the public land for the beneficial use of water rests not only on a dedication by Act of Congress, but on the reserved power of the States to control their waters for all purposes except navigation. The recognition by the Federal Government of the right of the States to control the development of their resources, including means of internal transportation and communication, does not interfere with its power to dispose of the public lands traversed by such easements. The land is sold subject to the easement without deduction in price or acreage. As said in *United States v. R. R.*, 6 McLean 517, 27 Fed. Cases, 692, 693:

"Whether we look to principle, or the structure of Federal and State governments, or the uniform practice of the new States, there would seem to be no doubt that a State has the power to construct a public road through the public lands. A grant to this effect is sometimes made by Congress, as in the Act of 1852; but this does not show the necessity of such a grant."

The imposition of a tax or charge by the Federal Government on such easements is as much an infringement upon the rights and property of the State as a tax on the securities of the State, or the salaries of its

officers; and it is the settled law that neither sovereignty can tax the property or governmental instrumentalities of the other.

*Van Brocklin v. Tennessee*, 117 U. S. 151

*The Act of October 2, 1888*, was a general appropriation Act including \$100,000 "for the purpose of investigating the extent to which the arid region can be redeemed by irrigation, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage of water for irrigation and the prevention of floods and overflows," by the Geological Survey, under the direction of the Secretary of the Interior, and reserving from sale, entry, settlement or occupation the lands so selected and all lands made susceptible of irrigation by such reservoirs, ditches or canals.

On account of the large withdrawals under this Act, and the dissatisfaction caused thereby in the public-land States, so much of the Act as provided for the withdrawal of the public lands from entry, occupation and settlement was repealed in the appropriation Act of August 30, 1890, "except that reservoir sites heretofore located shall remain segregated and reserved from entry or settlement as provided by said Act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof." The Act also provided that a reservation should thereafter be made in patents for land west of the one hundredth meridian, "a right of

way thereon for ditches or canals constructed by the authority of the United States."

These Acts contemplated the reclamation of arid lands by the direct action of the Government, as was finally provided in the Act of June 17, 1902, twelve years later. But the reservation of the most desirable sites, and the failure to make use of them, prevented their use by private enterprise, for the reason that the reservation from sale or entry, which was within the power of the Federal Government, was construed to be a prohibition of appropriation under the local laws, which was clearly beyond its power.

In 1890, a Select Committee of the Senate, on irrigation and reclamation of arid lands, was appointed, consisting of Senators Stewart, Allison, Hiscock, Plumb, Gorman, Jones of Arkansas, and Reagan. They made an elaborate report of over two thousand pages, and the result of their labors was the *Act of March 3, 1891*. Sections 18-21 of this Act relate to reservation of rights of way over the public land for reservoirs, ditches and canals, by the filing of maps in the same manner as the railway right-of-way Act of March 3, 1875 (18 Stat., 482), and Section 19 provided that upon the approval of such maps by the Secretary of the Interior, the same shall be noted upon the plats in the local land office, and "thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way." Under the provisions of this Act, therefore, a reservation of a right of way might be secured on surveyed lands in advance of actual appropriation and use, and patents or grants of the land be subject to the easement which the appropriator might thereafter acquire

by construction and use in accordance with the local laws, by reason of the constructive notice by the record in the land office. Section 20 extends the provisions of the Act to all canals, ditches, or reservoirs, theretofore or thereafter constructed whether by corporations or individuals, without reference to the purpose for which the water was or might be used. And as an explicit recognition of the fundamental principle that the local laws should control the appropriation of water and essential easements on the public lands, both unsurveyed and surveyed, the proviso at the end of Section 18 declares that the privilege therein granted,—that is, the privilege of filing maps and upon their approval of having the same noted on the plats in the local land office, and the subsequent conveyance of the land made subject to such easements before as well as after construction,—

“the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.”

Under that proviso, notwithstanding the grant of this privilege to an applicant and the approval of his maps, if he failed to proceed, with the diligence which the local laws required, to construct his works and apply the water to beneficial use, the proposed easement as well as the water would be subject to appropriation under the local laws by any other person, without any application to the Federal Government for approval of maps, but merely by making use of the water in compliance with the local laws. Such we understand to be the legal effect of this proviso, which

is merely a recognition of the constitutional right of the States to control their waters, and such has been the ruling of the land office.

In *DeWeese v. Henry Investment Company*, 39 L. D. 27, June 8, 1910, it was held that:

"Rights of way for reservoir sites under the Act of March 3, 1891, may be acquired by actual occupancy and development on the ground; and a mere application and map, unless followed with reasonable diligence by actual development and use, is no bar to appropriation of the site by another who proceeds with diligence to development and utilization thereof."

And at page 33 the "decision" says:

"The right may be obtained by construction without filing of a map at all. \* \* \* The filing of a map is requisite only to protect the grantee from claims by other parties. *Battlement Reservoir Company* (29 L. D. 112)."

In the case last cited, 29 L. D. 112, overruling 12 L. D. 79, it was held that the provision relating to filing of maps within a certain time was directory and not mandatory.

While the purpose of the original bill was to encourage irrigation by individual enterprise, yet it was so modified during its progress through committees, and in Congress, that the Act covers all ditches, canals and reservoirs, for all purposes, and in effect declares that rights of way may be reserved for all purposes for which such rights of way might be ac-



quired in connection with the use of water under the local laws as recognized by the 9th Section of the Act of July 26, 1866.

Thus the spirit of the Act of March 3, 1891, which should control its interpretation, was to aid the arid States and Territories in the development of their resources by permitting rights of way to be reserved in advance of use; but a portion of the letter of the Act has been so construed as to limit the class of grantees, where no grant was really intended, and to limit the purposes for which the waters might be used, although the Act was intended to leave the matter where the Act of 1866 left it, under the exclusive control of the local laws.

In the decisions of the Land Department themselves there is complete recognition of the fact that the rights of way over the public domain are really acquired by appropriation under the local laws and not by grant or patent of the United States, and these holdings continue after the passage of the recent Acts referred to.

As early as 1886 Secretary (later Justice) Lamar stated in the *Lennig Case* (5 L. D., at page 191):

"In this case the record tends to show that a water right in the springs on the Eureka mill site, and a right of way over the public domain for the ditches leading therefrom to the Eureka lode, has vested in Mr. Lennig. These rights are acquired by priority of appropriation and are governed by local customs and laws (*Broder v. Natoma Water Co.*, 101 U. S. 274), they are amply protected by the provisions of Sections

2339 and 2340, R. S., and I concur in your view that they are not patentable as water rights or rights of way."

And later, on the same page:

"It is entirely consistent with the United States laws, as I read them, that a tract of land may be covered by the water right of one person and by the settlement, mining or mill site claim of another person. Hence it must follow, as there is no express prohibition of it in the statutes, that a tract of land may be subject to both the water right and the mill site claim of the same person."

In the case of *Arrowhead Reservoir Co.*, decided in 1893, 16 L. D., 148, the Land Department denied the approval of a map under the Act of 1891, because a portion of the right of way sought was over unsurveyed lands. Assistant Secretary Chandler said, on page 149:

"To approve this map would grant the right of way over two pieces of land, separated by unsurveyed land, and to reach either the canal must be constructed across government land. This they probably intend doing under sections 2339 and 2340, R. S. If so, these sections are as applicable to surveyed as unsurveyed lands, and approval of this map would be useless."

In *Cache Valley Canal Company*, decided in 1893 (16 L. D., 192), the Interior Department again declined to approve maps for rights of way over unsurveyed land, and Secretary Noble expressly said (see page 196):

"Sections 2339 and 2340, R. S., secure the company, however, in its rights in said unapproved portion of said canal and reservoir, as these sections are not repealed or amended by the act of March 3, 1891."

In *Lincoln County Co. v. Big Sandy Co.*, decided in 1904 (32 L. D., 463), Secretary Hitchcock, at page 465, said:

"While the clause above quoted from section 20 of the Act of March 3, 1891, extends the benefits of that act to all canals, ditches, or reservoirs, theretofore constructed upon the public domain, among which is the right to file in that behalf with the land department a map of such canals, ditches, and reservoirs, and secure the approval of the Secretary of the Interior thereof, yet the rights of claimants under section 2339 of the Revised Statutes are in nowise dependent upon said act or upon an approval of such maps. See *Santa Fe Pacific R. R. Company* (29 L. D., 213). The purpose of the act of March 3, 1891, in respect to this, was primarily to extend to such claimants the right to place their claims of record with the land department for their better protection. It may be, too, that it enlarged the privileges conferred by section 2339 of the Revised Statutes, in that it gave the right to the use of fifty feet of land on each side of the marginal limits of canals, ditches, and reservoirs—a privilege not carried by said section—but, however this may be, it surely did not operate to make the continued enjoyment of rights conferred by said section dependent upon the filing of the maps provided for in the act."

As late as 1910, in *Sierra Ditch and Water Co.*, 38 L. D., 547, at page 548, this statement occurs:

"Whatever else might be argued or concluded with reference to this act (March 3, 1891), it is undoubtedly true that rights of way thereunder attach in only two ways: (1) by construction of a ditch or reservoir; and (2) by the approval of maps filed thereunder, subject to certain conditions subsequent."

One of the conditions subsequent referred to in the foregoing decision of the Land Department must be the doing of the work upon which the vested right must ultimately depend, including the diversion and application of the water to beneficial use in compliance with the local laws. The doing of these things is, therefore, in reality a condition precedent to the vesting of title to the easement, or, perhaps, to be strictly accurate, a condition concurrent, not only with the vesting but with the continuance of the right. See *Bear Lake Co. v. Garland*, 164 U. S. 1; *Jarvis v. State Bank*, 22 Colo. 309.

Following the case of *Schulenberg v. Harriman*, 21 Wall. 44, holding that such a grant could be revoked for breach of a condition subsequent only through judicial proceedings authorized by Congress, the department uniformly acted upon this rule, with respect to maps of rights of way of both railroads and canals, and held that its jurisdiction was exhausted upon the approval of maps.

See also *Noble v. Union River Logging Railroad*, 147 U. S. 165.

It was doubtless for this reason that the *Act of January 21, 1895*, authorized the Secretary to permit the use of the right of way for the purposes specified, and that the same form was adopted in the *Act of May 14, 1896*, so that the Secretary might, without judicial proceedings, cancel and clear the land-office records of an unused permit; and further, for the same reason, and in order to give to the Secretary an unquestioned right to revoke such unused permits, a proviso was added to the Act of February 15, 1901, so that the right of easement could not be held to become vested by virtue of the permission but only by virtue of the work done and use made under the local laws. It is submitted that under all the law on the subject and the underlying reserved powers of the States over their waters, this proviso is susceptible only of this construction. The proviso is as follows:

*"And provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."*

The Land Department had held in the case of *H. H. Sinclair et al.*, 18 L. D., 573, March 7, 1894, which was an application for a right of way under the Act of March 3, 1891, for ditches and canals in the San Bernardino forest reservation in California, stating that the applicants desired the use of the water for the purpose of generating electricity to be used in the lighting of certain cities, that "The grant made by this Act restricts the use of the land over

which the right of way is granted, to purposes of irrigation." And on page 574, the opinion of the Assistant Attorney General, approved by the Secretary, says:

"It appears also that these lands are as yet unsurveyed, and that if within the scope and purpose of the Act, the same cannot be approved so as to carry the right of way, as the maps contemplated to be approved under said Act are those showing the location of the ditches, canals or reservoirs proposed, in connection with the public surveys, which must be indicated on the maps filed for the purpose of securing the approval of the Secretary of the Interior.

"With this view as to the rights of the parties under the Act of March 3, 1891, I need not consider the second question as to what rights, if any, Baldwin, Burt et al., acquired by their action taken under the laws of the State of California, with a view to appropriating water upon this reservation, further than to state that by the eighteenth section of said Act of March 3, 1891, it is provided that 'the privilege herein granted shall not be construed to interfere with the control of water for irrigating and other purposes under the authority of the respective States or Territories,' which would seem to relegate the matter of appropriation and control of all natural sources of water supply in the State of California to the authority of that State. The Act of March 3, 1891, deals only with the right of way over the public lands to be used for the purposes of irrigation, leaving the disposition of the water to the State."

Mr. Caminetti, of California, introduced a bill in Congress, at its ensuing session, to revise this ruling of the Land Department, by amending the Act of March 3, 1891. But for the reasons above stated, and out of deference to the expressed wishes of the Commissioner of the General Land Office (see letter quoted below), to have the form of the Act of January 21, 1895, followed, so that the Secretary in granting permits for miscellaneous purposes might take into consideration the various and particular provisions of the States and Territories, in accordance with the proviso in Section 18 of the Act of March 3, 1891, "*so as not to interfere with the control of the local law,*" the bill was modified in the following session of Congress, as introduced by Mr. Bowers of California, and as passed in both houses.

The following debates in Congress, and the statements of the Commissioner of the General Land Office, show conclusively that it was not the legislative intent in this Act to interfere with the operation of the Act of 1866, or the local laws recognized by that Act, any more than in the Act of March 3, 1891. The unsupported statement of one member of Congress that "The power of revocation should exist somewhere, so that privileges given to corporations furnishing light or power shall not be abused," is not of sufficient force to operate as a repeal of a fundamental law to which no reference is made in the Act, and is of no validity whatever as evidence of the intent of the Act. As said in *Aldridge v. Williams*, 3 How. 9, 24:

"In expounding this law the judgment of the court cannot, in any degree, be influenced by the construction placed upon it



by individual members of Congress in the debates which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it passed."

And it is merely in connection with the history of the times in which the Act was passed, shortly after the first development of long-distance transmission of electric power; the refusal of the Department to approve maps for rights of way for the use of water for generating electric power, or any other beneficial purposes except agricultural irrigation, under the Act of March 3, 1891, in the *Sinclair* case and other cases, that the reports and the entire debate in both houses are here set out as a part of that history.

The fact that the bill passed in the Senate without any discussion whatever, and upon the motion of the late Senator Teller, is not without significance.

Senator Teller had been Secretary of the Interior, was a western man, thoroughly versed in the land laws of the United States, and particularly in the laws of the western States affecting the appropriation of water. It is inconceivable that he could have had the remotest idea that by the Act of May 14, 1896, the great fundamental principle, recognized by the

Act of 1866, that the local laws should control the use of water on the public domain for all purposes except navigation, was, or could be, in any way affected or modified by congressional legislation.

In a carefully prepared and able speech in the United States Senate on May 31, 1908, on the subject of "The State's Control over its Waters," included among the papers printed in 1913 for the Committee on Commerce, among other things, Senator Teller, after reviewing a number of leading cases on the subject, said:

"I want to say here now that in a careful examination of the authorities, running over months, I have never found a case where the Government of the United States has asserted its right to waters that I assert belong to the State."

"If sovereign over navigable waters (as held in *Mobile v. Eslava*, *supra*, and numerous other cases), is there any reason to say that the States are not sovereign over the non-navigable waters? How did the States retain their right? They retained it by withholding it from the General Government."

And replying to a question from Senator Sutherland, "whether or not his argument will not apply all the stronger to the case of non-navigable waters, such as exist in the irrigation States?"

"Undoubtedly. There is not a provision in the Constitution anywhere that would indicate that anybody supposed the General Government would have anything to do with such waters or their shores or the land under them. All the Government can do is to regulate the commerce on the streams."

The debates in Congress on the Act of May 14, 1896, follow (from the Congressional Record, January 15, 1896, page 703) :

**"RIGHT OF WAY ACROSS PUBLIC LANDS FOR  
RESERVOIR AND CANAL PURPOSES.**

Mr. Bowers (of California) asks unanimous consent to take up H. R. 3018 (Act of May 14, 1896), substituted for Caminetti bill, recommended by Secretary of the Interior and the Commissioner of the General Land Office.

MR. BOWERS: The existing law admits a right of way across public lands and reservations for ditches for irrigating purposes. This simply extends the right to construct that ditch for the purpose of conveying water to provide electric power across the public lands and reservations; and the bill, as I have said, if the gentleman from Tennessee will give me his attention, was drawn in the office of the Secretary of the Interior, and indorsed by him to the House. There can be no objection to it. I will say that about 6,000,000 acres of land have been given, including the crest of the Sierra Nevadas, for reservations, the source of all those streams, and our people want to get water for the development of electric power for lighting towns, for machinery, and various other purposes. I hope there will be no objection to it whatever.

MR. McMILLIN: Does this bill apply only to the State of California?

MR. BOWERS: No, it applies generally to reservations.

MR. McMILLIN: Does it include the National Park also, with all the other reservations of the Government?

**MR. BOWERS:** It applies only to reservations under the control of the Secretary of the Interior. It simply amends the law, extending the same right and giving no further right than is now possessed by ditches carrying water for irrigation.

**MR. McMILLIN:** Has the bill been recommended by any Committee of the House?

**MR. BOWERS:** It has been unanimously reported by the Committee on Public Lands of the House—by the full Committee.

**MR. McRAE:** Mr. Speaker, if my colleague on the Committee will allow me, I will state that this bill does not grant or authorize the grant of any land. It only authorizes the Department to issue permits for the use of these lands for the purposes stated. It does not apply to the National Yellowstone Park, not to military reservations, but only to lands reserved for forestry purposes.

**MR. McMILLIN:** Does the bill provide that these grants may be revoked?

**MR. McRAE:** The bill makes no grant.

**MR. McMILLIN:** Well, these privileges?

**MR. McRAE:** They are issued by and are all under control of the Secretary of the Interior. The bill makes no grant and vests no title to any lands.

**MR. McMILLIN:** I observe that the matter is under the control of the Secretary of the Interior, so far as giving permission is concerned, but does the bill provide that he may revoke a permit if it should be abused,

or if it should become to the interest of the Government to have it revoked? \*

MR. McRAE: He has the power to do that. But, Mr. Speaker, what I rose to say was that this bill does not make any grant, or authorize the making of any grant, and that no person under it can acquire title to any land. No person can get anything but a permit, to use for the purpose intended in the bill.

MR. McMILLIN: I am anxious, Mr. Speaker, to see that there should not be granted any privileges which would be beyond the control of the Government. I think that the interests of those who are to receive benefits from this action indirectly demand that the power of revocation should exist somewhere, so that privileges given to corporations furnishing light or power shall not be abused. I am glad to learn that that is provided for.

There being no objection, the bill was considered, and ordered to be engrossed and read a third time; and, being engrossed, it was accordingly read the third time, and passed."

From the report of the Committee, February 27, 1895, Caminetti H. R. 8958:

"In California and elsewhere, the small towns and cities located in the valleys can

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\* It should be noted that Mr. McMillin's remarks apply to the permission of the Secretary contemplated by the Act. This permission, he seems to argue, which is authorized for the purpose of encouraging the development and use of water power, should not be used so as to tie up such resources without actual development. If so used, or rather abused, it should be subject to revocation by the Department. But the impossible idea that rights which have become vested by construction and use in a public service of vital importance should be subject to revocation and confiscation in the Secretary's discretion is not to be found in these debates, and not in any Act of Congress.

utilize electric light and power at minimum cost if allowed the right of way across the Government lands in the foothills of the mountains as this bill permits."

From letter of S. W. Lamoreux, Commissioner, to Hoke Smith, Secretary, February 15, 1895:

"It seems to me proper that this extension of the use of such easements should be under the full control of the Department, as in that Act (January 21, 1895), because of the policy expressed in the proviso in Section 18 of the Act of 1891 (*supra*) that 'the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States and Territories,' some of the States and Territories having by law given preference to domestic and agricultural uses of water over others, e. g., Colorado, Utah, Idaho, and South Dakota. *The permission to use the public lands for carrying water for miscellaneous purposes should accordingly be allowed in such manner as not to interfere with the control of the local law.*" (Italics ours.)

From Mr. Bowers' report, January 10, 1896, H. R. 3018, identical with bill reported for passage at the last session of the 53rd Congress:

"The existing law grants the right of way over public lands for ditches for irrigating purposes. This bill simply extends the same privileges under the same restrictions, to ditches conveying water for the purposes of generating, manufacturing and distributing electric power."

From the Congressional Record, May 5th, 1896,  
Senate, page 4838 (H. R., 3018) :

"RIGHT OF WAY ON PUBLIC LANDS FOR ELEC-  
TRIC POWER.

MR. TELLER: I ask the Senator from New Hampshire if he will allow me to call up a bill of some local importance. There is some necessity for its immediate passage. It is a House bill, and will not take up any time. If there is any discussion over it, I will withdraw it.

MR. GALLINGER: I yield for that purpose.

MR. TELLER: I ask unanimous consent for the present consideration of the bill (H. R. 3018) to amend the Act approved March 3, 1891, granting the right of way upon the public lands for reservoir and canal purposes.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill. It proposes to amend the act entitled "An Act to permit the use of the right of way through the public lands for tram-roads, canals, and reservoirs, and for other purposes," approved January 21, 1895, by adding thereto the following:

'Sec. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of 25 feet, together with the use of necessary ground, not exceeding 40 acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purpose of generat-



ing, manufacturing or distributing electric power.'

The bill was reported to the Senate without amendment, ordered to a third reading, and passed."

The provisions of this Act, for the "use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres," have a more logical reference to transmission lines and station sites than to canals, ditches and reservoirs. Although the Act is of general application, its immediate purpose, as shown by its legislative history, was to enable the people in California to obtain rights of way for power plants in the forest reserves. It should be noted that the Act speaks of rights of way upon the public lands and forest reservations "for the purposes of generating, manufacturing, or distributing electric power." Now, as a positive physical fact, such power is generated or manufactured by electric machinery in a generating station, whether operated by water power or any other kind of power, and it is distributed over transmission lines; and, as a negative physical fact, it is neither manufactured nor distributed by means of a reservoir, ditch or canal.

While the *Sinclair Case*, *supra*, held that the maps of rights of way under the Act of 1891 for the use of water could be approved only for the purpose of irrigation, nevertheless it did not question the right to appropriate water for any beneficial purpose under the laws of California, whether within or without a forest reservation. This right being unquestioned, it would seem that the Act of May 14, 1896,

was intended to cover an additional right, namely, the right to use a station site where the water power might be transmuted into electric current, with a reasonable area for the necessary buildings, and a right of way of twenty-five feet for a transmission line by means of which the current so generated might be transmitted to the towns and cities and other places where it could be applied to beneficial use.

Forty acres would be ample for a generating station, but many reservoirs are necessarily of much larger area; and twenty-five feet would be wide enough for a transmission line, but far too narrow for many ditches and canals.

Such was, indeed, the construction placed upon the Act in 28 L. D., 474 (1899), in which the Assistant Attorney General in referring to the Act of January 21, 1895, said:

"This Act was amended by that of May 14, 1896 (29 Stat., 120), but this amendment does not refer to permits for canals and ditches."

And it should be noted that this same opinion, consistently with the ruling in the *Sinclair Case*, which recognized that the Act of March 3, 1891, did not affect the operation of the Act of 1866, holds that subsequent legislation relating to permits or reservations of rights of way for the use of water has no relation to the Act of 1866. Quoting from 28 L. D., 474, at page 476:

"Sections 2339 and 2340, Revised Statutes, do not authorize the Secretary of the

Interior to grant any right of way for ditches and canals, but simply recognize such rights to the water on the public domain as may have accrued under local usages and customs. These sections do not affect the question here under consideration."

The first regulations promulgated by the Department under this Act, 23 L. D., 519-521, December 23, 1896, provide for the filing of maps and field notes for the purposes mentioned, the same as required by the regulations under the general right-of-way Acts for railroads and canals.

The true construction to be placed on the nature of the privilege or permission granted by the act of the Secretary is well illustrated in the case of *Homer E. Brayton*, 31 L. D. 364, July 2, 1902. The Commissioner's ruling, rejecting Brayton's homestead entry on the ground that the land was embraced in a map of location under the Act of March 3, 1891, was reversed, quoting from page 365:

"The question presented for consideration is, whether or not the filing and approval of the map, as required by the 19th section of said act, has the effect to withdraw the land embraced therein from other disposition by the United States.

"Said section provides that 'upon the approval thereof (of the map) by the Secretary of the Interior, the same shall be noted upon the plats in said office (the local office) and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such rights of way.'

"It is thus expressly provided by the statute that after the approval of the map

the lands over which such right of way shall pass *'shall be disposed of* subject to such rights of way.'

In departmental regulations concerning right of way for canals, ditches, and reservoirs over the public lands and reservations, approved June 27, 1900 (30 L. D. 325), it is provided that: 'The act is not in the nature of a grant of lands; it does not convey an estate in fee in the right of way. It is a right of use only, the title still remaining in the United States. All persons settling on a tract of public land, to part of which right of way has attached for canal, ditch, or reservoir, take the same subject to such right of way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases.'

The approval of the map did not have the effect to vest the title to the land in the company, but it still remains in the United States, the company having the right only to use the land, which may be disposed of subject to that right."

As a further conclusive proof that the filing Act of March 3, 1891, reserving rights of way for the use of water, was not intended in any way to modify or affect the operation of Section 2339, U. S. R. S., Congress on August 4, 1892 (27 Stat., 348), more than a year after the passage of that Act, amended the Act of June 3, 1878 (20 Stat., 89), providing for the sale of timber lands, extending the earlier Act to all "public-land States." That Act contained the following proviso, almost identical in language with Section 2340, U. S. R. S.:

"And provided, further, that none of the rights conferred by the Act approved July twenty-sixth, eighteen hundred and sixty-six, entitled 'An Act granting the right of way to ditch and canal companies over the public lands, and for other purposes,' shall be abrogated by this Act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under the provisions of said Act; and such rights shall be expressly reserved in any patent issued under this Act."

As a further convincing proof that the principles declared in Sections 2339 and 2340, U. S. R. S., continued to be recognized as in full force and effect, in the Territories as well as in the States, after the passage of the Act of February 15, 1901, Congress incorporated these sections in the Act providing for the government of the Philippine Islands, approved July 2, 1902 (32 Stat., 691, Sections 50 and 51).

Section 2339 has been held applicable to the Territory of Alaska, purchased in 1867. In discussing this Act in a case arising in Alaska, *Van Dyke v. Midnight Sun M. Co.*, 177 Fed. 85, 91, the court says:

"The doctrine of appropriation thus established was not a temporary thing, but was born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the status of water rights with respect to public lands."

(c) *The Construction Placed upon the Act of May 14, 1896, by the Department of the Interior.*

As already noted, the first regulations under this Act included the Act of January 21, 1895, and while they make a distinction between the so-called grant in the Act of 1891 and the permission in these later Acts, they still provide for the filing of maps in accordance with the regulations and procedure already established under the earlier Act and the railroad right-of-way Act, and notation on the tract books. See Regulations, 23 L. D., 519, December 23, 1896.

Regulation 8, page 521, seems to make a distinction between the four purposes covered by these two Acts, namely, (1) tramroad, (2) canal, (3) reservoir, or (4) for electric purposes. This would indicate that even at this time the Act was not construed by the Department as applying to canals and reservoirs, as was afterward distinctly held in the opinion in 28 L. D., 474, June 6, 1899, in discussing the Act of January 21, 1895, as follows:

"This Act was amended by that of May 14, 1896 (29 Stat., 120), but this amendment does not refer to permits for canals and ditches."

However, in the case of *H. W. O'Melveny*, 24 L. D., 560, June 23, 1897, in a letter bearing the same initials as the foregoing opinion, a map was approved for a ditch under the Act of May 14, 1896, the applicant being required to limit the proposed purposes to "generating, manufacturing, or distributing electric power." As an engineering proposition it is difficult

to see how a ditch could be used for distributing electric power. It is also pertinent to inquire what effect a revocation of the permission given to the applicant in this case would have had after he had completed his appropriation under the local law and applied the water to the beneficial use designed, or in case he had changed the purpose for which the water was used from power to agricultural irrigation, or had transferred his water right, for instance, to a municipality for domestic use, or if it had been taken for some such higher use by condemnation proceedings. Would the revocation of the permission—which would be presumably done by noting such revocation upon the tract books in the local office—and the subsequent conveyance of the land by the Government have conveyed a title free from the encumbrance of the easement, especially when the patent expressly stated that it was subject to vested water rights for any purposes recognized by the local laws, whether “mining, agricultural, manufacturing or other purposes,” and rights to ditches and reservoirs used in connection therewith? What standing would such patentee have in any court, State or Federal, on such a question?

Again, in the case of *Chicala Water Co. v. Lytle Creek Light and Power Company*, 26 L. D., 520, April 15, 1898, the application of the latter company including two reservoirs and canals for a power plant on forest reserves in California, under the Act of May 14, 1896, was protested by the former company on the ground of its prior appropriation of the waters of Lytle Creek. The application was at first “rejected as to the right of way for reservoirs, for the reason that each of the sites applied for covered an area



greatly in excess of the area authorized by the Act of May 14, 1896." The applicant amended its application so as to exclude the reservoirs, and it was ordered to be approved upon a satisfactory showing that the use by the power company would not interfere with the rights of the water company,—a question, which as the land-office letter seems to recognize, is within the exclusive jurisdiction of the courts. One statement in the letter, at page 525, is worthy of note, as being generally applicable to forest reserves:

"It is not shown that the construction of these reservoirs will be detrimental to the interests of the United States, or the State of California, or interfere in any manner whatever with the occupation and control of the forest reserves. These reserves were intended mainly for the conservation of the water supply."

In the case of *Crystal Lake Irrigation and Power Company*, 27 L. D., 315, July 29, 1898, an application for permission to use right of way under the Act of May 14, 1896, in the San Gabriel timber land reserve was granted, the ground designated for use by the company being in four tracts aggregating 19.90 acres, but it does not appear in this report whether the use was for reservoirs, ditches, or station sites. It should be noted that the permission is granted by the Secretary's "endorsement on the map to that effect" (page 316). If the ground occupied was merely for ditches, the limitation of forty acres would seem to put an unexpected limitation on the length of the ditch, as well as on its width.

In *Bear River Valley Irrigation Co. v. Roberts, Trustee*, 30 L. D., 382, December 24, 1900, the company's protest against Roberts' application for right of way for canals, conduits and pipe lines, and 19.75 acres of ground in the San Bernardino forest reserve, under the Act of May 14, 1896, for the purpose of generating, manufacturing and distributing electric power, was dismissed, the decision holding that "the diverted waters can be utilized by Roberts in the operation of the proposed plant and returned to their natural channel without impairment of the uses to which they have been appropriated by the protestant company." It is submitted, however, that this decision would not be *res judicata* in a suit between the company and Roberts on account of any interference by him with the company's prior appropriation; that the question of the ultimate rights of the parties is, as the opinion says (page 386), solely within the jurisdiction of the courts, and that the matter of administration within the jurisdiction of the Department, as said in the regulations in the same volume, 30 L. D., at page 327, is "limited to the approval of maps carrying the right of way over the public lands."

As already noted, the Act of May 11, 1898, substituting a new section 2 for the section 2 added by the Act of May 14, 1896, to the Act of January 21, 1895, and amending the original Act of 1895, in its first clause, was treated by the Department as superseding the two earlier Acts. Regulations, June 27, 1900, 30 L. D., 325.

In the case of *Mountain Power Co. v. Newman*, 31 L. D., 360, June 20, 1902, in which the company protested against the issuance of patent to Newman

on the ground that the land was covered by an application for 20 acres for "a power house site," also for canals, under the Act of May 14, 1896, approved September 21, 1897, in the name of A. G. Hubbard, to whose rights the company had succeeded, the Commissioner's action dismissing the protest was affirmed. At page 361, the decision says:

"The permission given to Hubbard under the Act of May 14, 1896, did not amount to a reservation or appropriation of the lands included in his application, so as to take them out of the operation of the public land laws. Further, it does not appear that said company is in the actual use of the lands embraced in Hubbard's application, which was approved more than four years ago, it being merely alleged that 'this protestant, in good faith, intends, and expects to utilize the said rights for the purpose for which they were granted.' Neither Hubbard, nor any one claiming under or through him, would therefore seem to be in a position to object to the disposal of the lands embraced in said application."

It is submitted that the patent issued in this case to Newman would be subject to any water rights vested and accrued under the laws of California, and that any dispute as to the extent of those rights, including the question whether the company was proceeding with diligence under the laws of the State in the construction of its works and the perfecting of its water rights, could only be determined in a suit between the parties in a court of competent jurisdiction, and further that the existence of such easements does not interfere with the disposal of the soil.

In *Kings River Power Co. v. Knight*, 32 L. D., 144, May 29, 1903, the company claimed a prior appropriation in its protest against Knight's application under the Acts of May 14, 1896, and February 15, 1901, for certain rights of way in the Sierra Forest Reserve in California, for the generation and distribution of electrical power, and the protest was dismissed and the maps approved. The right of way applied for included three power house sites, as well as certain flumes, tunnels and pipe lines.

The company also claimed that Knight's notice of appropriation was insufficient, and on this point at page 145, this "decision" says:

"It is not the province of this Department to pass upon the sufficiency of a water appropriation. Inasmuch as the Sprout notice of November 5, 1901, was posted upon the public lands of the United States within a forest reserve, it is not surprising that it recited that the appropriation was made 'in compliance with the laws of the United States.' If it had recited that it was made by permission of the laws of the United States and in compliance with the laws of California, it would have been unobjectionable, and this was evidently what was intended. In any event, it is not shown or alleged that the protestant or any one else was misled by it."

And at page 146:

"The acts of May 14, 1896, and February 15, 1901, *supra*, were intended to encourage industrial activity, and it is therefore the duty of this Department to see to

it that the public domain is not incumbered with mere paper rights of way, designed by promoters as a basis of speculation. But while this is so, the Department can not try close questions of water rights arising under State laws. It has always insisted on a *prima facie* showing of such rights, and without attempting to say generally of what this showing should consist, it is enough to say that the showing is sufficient in the present instance. It should be remembered always that the Department is in no sense passing upon the validity of the appropriation, and this question is not directly involved in the approval of maps for the use of rights of way under said Acts. This is ultimately a question for the courts."

Finally, in the case of *Irrigators, etc., v. Electric Water Company and Electric Power Company*, 32 L. D. 178, June 19, 1903, the Secretary reversed the decision of the Commissioner denying the applications of the power company under the Act of March 3, 1891, for a right of way through the San Gabriel Forest Reserve, in California, dismissed the protest of the irrigators and ordered that the maps be submitted for approval. The applications were evidently made before the passage of the Act of February 15, 1901, for the opinion recites that a hearing was ordered by the Commissioner, "and the case was heard at the local land office from September 4, to December 13, 1900."

The right of way in the two applications was substantially the same, the enterprise being a joint one for the purposes of irrigation and the generation and distribution of electric power. The right of way ap-

plied for included two power house sites of about twenty acres each, and a reservoir site covering 67.60 acres.

The case seems to have been tried on the theory that the local land officers were acting in a judicial capacity for the purpose of determining whether the proposed appropriation would interfere with the prior appropriations of the irrigators, whether there was surplus water subject to appropriation, whether the project of the companies would not destroy the water sources of the river, the forest and the forest reserve, and whether applicants' maps were reliable, all of which questions were raised by the allegations of the protest. Much testimony was adduced, and many expert witnesses testified. Obviously all of these questions could be determined only by a court; and it is respectfully submitted that the approval of maps in this case would not be a bar to any action by the irrigators based on a claim that their prior rights were interfered with by the action of the companies subsequent to the approval of the maps. This is a rule and a principle frequently recognized in the land decisions, and adherence to it and confining the action of the Department to the approval of the maps upon its appearing that they conformed with the law and the regulations would have saved the parties in this case much expense and time, and would have left them in the same position in which they found themselves after a long and expensive trial in the local land office and before the Commissioner and the Secretary, upon questions over which those officials had no jurisdiction. If the reasoning of the decision in *Silver Lake Power & Irrigation Co. v. City of Los Angeles*, 37 L.

D., 153, had been followed, to the effect that the approval of an application could not injure or destroy the rights of a prior appropriator, and that the Department was without jurisdiction to determine that question, all this confusion would have been avoided in this case.

The decision is interesting, however, as showing that the proposed use of water for the power plant and for irrigation is not detrimental to the forest or the water flow; that the size of the reservoir is not limited; that the Act of June 4, 1897, contemplated the use of water within forest reserves under the laws of the State, and that such appropriation involved the use of necessary material, and even the destruction of timber along the proposed right of way.

The following is quoted from page 182 and it is worthy of note that this decision was rendered in 1903, more than two years after the passage of the Act of February 15, 1901, and long before the anomalous theory of special-use agreements under that Act for commercial power plants had been evolved:

"It is also urged that because some of the claimed water rights of the applicants rest on locations made at a time when no law authorized the appropriation of water within a reservation of the United States, the application should be denied. While there might be some doubt as to whether water locations under the laws of California could be legally made within the boundaries of a government reservation prior to the passage of the Act of June 4, 1897 (30 Stat. 36) such locations were authorized by that act,



and inasmuch as no person is asserting in this record a better claim to these waters, the question is not of sufficient importance to warrant discussion."

We do not find any more cases in which the Act of May 14, 1896, is discussed, after the one last cited. As we have seen, that Act was treated by the Department as having been superseded by the broader provision in the new "Section 2" of the Act of May 11, 1898. All of the regulations of the Department after the passage of the Act of February 15, 1901, treat it as entirely superseded by that Act. And thus, an Act intended evidently to encourage the development of the country through a newly developed science, and superseded by even broader and more generous legislation in 1898, according to departmental construction, drops entirely out of view until it is resurrected from oblivion in the *Utah Power & Light Case*, fifteen years after its supposed supersession by a broader Act, and now used as an instrument of confiscation and suppression of the development it was designed to foster and encourage.

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(d) *History of Certain Acts of Congress on the Subject After 1896.*

In the case of *Blue Water Land and Irrigation Company*, 23 L. D., 275, June 6, 1896, an application for a reservoir site in New Mexico, under the Act of March 3, 1891, was denied by the Secretary of the Interior, for the reason that the site had been reserved under the Act of August 30, 1890, by the Government.

This ruling was the immediate occasion for the passage of the Act of February 26, 1897 (29 Stat. 599), which provided that "all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one," by States, individuals or private corporations, with a proviso that the charges for water should be "subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or in part situate."

The connection of this legislation with the ruling of the Land Department is shown in the debate in the House on February 17, 1897, in which Mr. Lacey said:

"The Secretary of the Interior, in a decision rendered by him, held that this Act (March 3, 1891), which was obviously for the purpose of utilizing these reservoir sites, expressly excepted them and only allowed the occupation by reservoirs and canals on lands outside of the reservoir sites. The Act of 1888 says that they shall be reserved 'until further provided by law.' In 1891 it was further provided in the right of way act for canals and reservoirs, that the waters of the arid regions might be utilized for the purpose of improving and cultivating that country." And referring to the case of the *Blue Water Land & Irrigation Company*, *supra*, he says:

"The Commissioner of the General Land Office held precisely the other way."

"The very pith and marrow of the whole question involved in the bill now being considered by the House is contained in the statement that it was not contemplated that these sites should be 'reserved from use, but

for use.' The Act of 1888, as amended by the Act of 1891, as construed by the Secretary of the Interior, reserves these reservoirs from use and not for use. A reservoir site without water is entirely useless. The water is the particular thing in question, and the waters are controlled by the States through which they flow, and not by the United States of America. These are surface waters, the waters of small streams not navigable, and the States control them.

"Now, the Act of 1888, as amended by the Act of 1891, having set apart the most eligible reservoir sites all over the United States, and having been construed as reserving them from occupation, the Government is placed in the position of a dog in the manger. We will neither eat the hay ourselves, nor let anybody else eat it. The result is that these sites, instead of being flooded with water and a source of plenty and wealth to the regions in which they are located and where they ought to be used, stand as arid as the surrounding country, and persons who desire, under the Act of 1891, to impound water must select some less eligible site, outside of the boundary of the Government site, and there collect the water. In a number of instances this has already been done, and the water has been diverted from the Government reservoir and used for irrigation, at an increased expense, because the natural sites have been reserved and are not allowed to be used for the purpose for which the Almighty evidently intended them in the formation of that country."

The proviso recognizing the right of the States to control and regulate the use of their waters, was an

amendment proposed by Mr. Cannon, and was said by Mr. Shafroth of Colorado to be satisfactory. In discussing the substitute offered by Mr. Terry, Mr. Shafroth said:

"That part of it which seeks to have the United States Government control these waters is, it seems to me, in violation of the Constitution of the United States. I do not believe that the United States has the power to control these waters. Such power was never delegated by the States, and the United States has never attempted to exercise the same. The Constitution of the State of Colorado, under which it was admitted into the Union, provides that the waters shall remain the property of the State. The amendment which has been proposed by the gentleman from Illinois (Mr. Cannon) and adopted, really serves no purpose, because it merely re-enacts the existing law. It would be the law even if the Act of 1891 were not in existence. The waters belong to the States. The United States Government has always recognized that, and the States have enacted legislation directly controlling the use of the waters."

This bill passed in the Senate February 24, 1897, without debate. (Cong. Rec., page 2202.)

Before referring to the Land Department's regulations and rulings on the Act of May 14, 1896, we will next examine further the rulings of the Department on the Act of March 3, 1891, which led to the Acts of Congress of May 11, 1898, treated by the Department as superseding the Act of May 14, 1896, and on the Act of February 15, 1901, treated as super-

seding all prior legislation on the subject except for irrigation and purposes in subordination thereto under the Act of March 3, 1891.

In *South Platte Canal and Reservoir Co.*, 20 L. D. 154, 464 (1895), it was held that maps would not be approved under the Act of March 3, 1891, when the water was desired for "furnishing water in cases of emergency to the City of Denver," and for "irrigating gardens and lawns in the city and vicinity thereof."

In *Chaffee County Ditch and Canal Company*, 21 L. D. 63, July 18, 1895, the approval of maps was refused for the reason that, although the company desired to use the water for the main purpose of irrigation, it stated that it also wished to avail itself of the right to float timbers on its canal.

The Commissioner, in his letter submitting the map, says he is unable to decide how strictly the expression "sole purpose of irrigation" is to be construed, particularly in view of the words in Section 18 of the Act of March 3, 1891, that "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under the authority of the respective States or Territories." In response to this suggestion the Secretary's letter says:

"In reply to that portion of your office letter above quoted, I have but to say that the language of section 16 (18), of the Act of March 3, 1891, quoted therein, has no application to the purpose for which the right of way granted might be used, but was plainly a disclaimer on the part of Con-

gress of any attempt to control the use of water desired to be stored or conducted through canals, which was to remain under the authority of the respective States or Territories."

In the case of *H. W. O'Melveny*, 24 L. D. 560, June 23, 1897, the application was for both irrigation and power under the Acts of March 3, 1891, and May 14, 1896, and a ruling was made that the two Acts "are so different in the character of estate or permission therein provided for, as well as in the uses to which the right of way may be devoted and the extent of such right of way, that no permission or grant can be sanctioned which is based on the two Acts. The permission granted must rest either upon one Act or the other." The applicant chose to confine the application to power purposes and his maps were approved under the Act of May 14, 1896.

This opinion overlooks the fact that the right rests fundamentally on the actual use; that under the laws of the State the use may be for any beneficial purpose, and that the purpose may be changed without invalidating the right. Any attempt, therefore, to limit the purpose for which the water may be used is to modify by departmental regulation the laws of the State, which the Acts of Congress recognize as controlling for all purposes.

Again, in the case of *William Marr*, 25 L. D. 344, October 22, 1897, the applicant prayed to be relieved from the requirement that he should certify that the right of way was desired for the sole purpose of irrigation, "upon the grounds that, while the right of way is to be used chiefly for irrigation, yet a

declaration to the effect that it was for that sole purpose would endanger his water right under the laws of Colorado; that as settlements that will be made along the line of the outlet will require water for domestic purposes, it is also claimed for such use; and that the applicant also desires to make use of the water for a limited period of time for manufacturing purposes, in the operation of hydraulic mining machinery, etc." The Secretary's letter affirms the Commissioner's decision, declining to approve the maps, and refers to the preceding cases in 20 L. D. 154, 21 L. D. 63, and 24 L. D. 560.

These narrow rulings of the Department led to the passage of the *Act of May 11, 1898*, which in its enacting clause and first section completely amends the Act of January 21, 1895, and adds a new Section 2,—which the Department, as we shall see, treated as a substitute for the former Section 2 of the Act of January 21, 1895, added to it by the Act of May 14, 1896,—the new Section 2 being as follows:

"Sec. 2. That the rights of way for ditches, canals or reservoirs heretofore or hereafter approved under the provisions of Sections eighteen, nineteen, twenty, and twenty-one of the Act, entitled, 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

In the original form of this bill there was a period where the semi-colon appears after the words



"for purposes of a public nature" (see Cong. Record, House, February 10, 1897, page 1714); and the last sentence is a separate and complete sentence in itself, regardless of punctuation.

The comprehensive regulations concerning right of way for canals, ditches and reservoirs over the public lands and reservations, approved July 8, 1898, 27 L. D. 200:

"For irrigation—Under Sections 18 to 21, Act of March 3, 1891 (26 Stat. 1095) the Act of February 26, 1897 (29 Stat. 599) and the Act of May 11, 1898 (Public, No. 88).

"For oil pipe lines—Under Act of May 21, 1896 (26 Stat. 127).

"For the construction of reservoirs on public lands for watering live stock—Under Act of January 13, 1897 (29 Stat. 484),"

in which all these Acts are quoted, as embracing all the existing legislation on the subject, make no reference whatever to the Act of May 14, 1896. Before quoting the Act of May 11, 1898, the following statement is made on page 201:

"The Act approved May 11, 1898 (Public No. 88) entitled 'An Act to amend an Act to permit the use of the right of way through public lands for tramroads, canals, and reservoirs, and for other purposes,' makes an important declaration in Section 2 as to the purposes for which the rights of way under the Act of 1891 may be used."

And after quoting the Acts of March 3, 1891, and May 11, 1898, the regulations continue on page 202:

"1. These acts are evidently designed to encourage the much needed work of constructing ditches, canals and reservoirs in the arid portion of the country by granting right of way over the public lands necessary to the maintenance and use of the same. The eighteenth section of the Act of 1891 provides that:

The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

The control of the flow and use of the water is therefore, so far as this Act is concerned, a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this department being limited to the approval of maps carrying the right of way over the public lands."

And on page 208 these regulations provide in regulation 24, in accordance with the provisions of the new Section 2 in the Act of May 11, 1898, that:

"Applicants under the Act of March 3, 1891, must include in the certificate (Form 4) the statement: 'And I further certify that the right of way herein described is desired for the main purpose of irrigation,' or 'for public purposes,' as the case may be. If for public purposes, the applicant should submit a separate statement of the nature of the proposed use."

These same statements are repeated in the regulations approved June 27, 1900, 30 L. D. 325, 326,

333, and June 26, 1902, 31 L. D. 503, 504, 513, from which again the Acts of January 21, 1895, and May 14, 1896, are entirely omitted, being treated as superseded by the Act of May 11, 1898, which in its first section amends the former *in toto*, and which substitutes a new Section 2 for the latter.

While this contemporary and long continued construction of this Act is persuasive, if it can be clearly said that the Act of May 14, 1896, related to ditches, canals, and reservoirs, yet it is perhaps not tenable if that Act related to station sites and transmission lines; but, in either case, the construction placed upon it by the Circuit Court of Appeals, that it was evidence of an intent of Congress to "assume complete control of the subject-matter," is manifestly erroneous. That control, as said in the foregoing regulations of 1898, 1900 and 1902, is exclusively in the States and Territories, "the matter of administration within the jurisdiction of this department being limited to approval of maps carrying (or, to be technically correct, reserving) the right of way over the public lands."

For it is use, and use alone, that carries the right of way over the public lands for these purposes; and this use is a matter of purely local control. As said by Justice Elliott in *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 152:

"The very birth and life of a prior right to the use of water is actual *user*."

These were the laws and the regulations of the Department which were in force and effect nine years ago, when the defendant's hydro-electric plant was

constructed, not only without objection on the part of the plaintiff, but by its invitation.

We are not aware of any letter in the published reports of the Department that ever held that the Act of 1866 was modified by any Acts of Congress, until, in the letter in the *Kern River Case*, 38 L. D. 302, 309 (November 12, 1909), it was said that Congress did not contemplate power companies in 1866, because they were not in existence at that time; nor are we aware of any other decision of any court in this country, either State or Federal, which has ever held that rights to the use of water and essential easements over the public lands may not be acquired by construction and use in accordance with the local laws, without reference to any application to the Federal Government for approval of maps, or any other formal license. As was said in *Anderson v. Spencer*, 38 L. D. 338 (1909) :

“Under the Act of March 3, 1891, rights may be secured by the diligent prosecution of field work, without reference to permissible procedure before the Land Department looking towards the approval of such right of way.”

This means, of course, that the Act of 1891, like the Act of 1866, recognized the operation of the local laws, under which rights to the use of water are acquired only by the diligent prosecution of field work and the application of the water to some beneficial use, and that vested rights could be obtained in that way without a paper permit.

These statements in the regulations were not changed until September 28, 1905, 34 L. D. 212, 214,

when the following was added to the statement concerning the "important declaration in Section 2 as to the purposes for which the rights of way under the Act of 1891 may be used":

"but does not authorize the approval of any application for right of way for purposes other than irrigation."

And at page 222, the applicant is required to certify that the right of way is desired for the main purpose of irrigation (see also 36 L. D. 567, 574).

Nor was it the intention of Congress—assuming for the sake of argument that it was within its power—to put any other restrictions than these on the control of the States over the appropriation of water and rights of way therefor on the public land by the *Act of June 4, 1897* (30 Stat. 11), within the forest reservations authorized by that Act. The Act recites that "no public forest reservation shall be established except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States," and that it is not the intent or purpose of the Act to permit the inclusion of mineral and agricultural lands in such reserves. The Secretary of the Interior is authorized by the Act to make "such rules and regulations and establish such service as will insure the object of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." The Act further provides that nothing therein contained shall "prohibit any person from entering upon such

forest reservations for all proper and lawful purposes;" and this further express provision is contained in the Act:

"All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

The laws of the United States therein mentioned can only refer to the laws which may be constitutionally enacted under the power of Congress to regulate commerce. Although Territories are not expressly mentioned in the provision above quoted, it must be assumed that as prospective States, under the decisions already cited, they would have the same rights before being admitted into the Union as the States already admitted.

The conflicting rulings of the Land Department, particularly the narrow rulings to the effect that, notwithstanding the Act of May 11, 1898, the class of grantees was limited to companies formed for the purpose of irrigation, and that maps could not be approved except for the purpose of irrigation, led to the passage of the *Act of February 15, 1901*.

In the report of the Secretary of the Interior for 1899 the Secretary said, referring to legislation on rights of way for canals and ditches through the public lands:

"Sections 2339 and 2340 of the Revised Statutes, the act of March 3, 1891 (26 Stat. L., 1095, secs. 18-21), the act of January

21, 1895 (28 Stat. L., 635), the act of May 14, 1896 (29 Stat. L., 120), and the act of May 11, 1898 (30 Stat. L., 404), relating to rights of way for ditches, canals and reservoirs over the public lands and reservations of the United States, are so confused and so fragmentary in their nature that the Department is greatly embarrassed in their administration. For instance, the act of March 3, 1891 (26 Stat. L., 1095), grants rights of way, for ditches, canals and reservoirs used for the purposes of irrigation, and the act of May 11, 1898 (30 Stat. L., 404) in its second section authorizes the use of these rights of way for other specified purposes. The latter act, however, instead of granting rights of way for these newly specified purposes, merely enlarges and extends the uses to which rights of way granted for the purposes of irrigation may be applied. Thus a right of way cannot be obtained where it is intended to use the water exclusively as a means of creating power to run an electric or manufacturing plant or in hydraulic or placer mining, although when a right of way is once obtained for irrigation purposes it may also be used for these other purposes in a subsidiary way.

"The several acts relating to this subject should be brought together and harmonized in a new act, the terms of which should be broad and comprehensive enough to afford the widest possible use, for all beneficial purposes, of the waters on the public lands and reservations of the United States, so long as the same is consistent with the preservation of the public interests in the attainment of the purposes for which the various reservations are established."



Accordingly, in the first session of the Fifty-sixth Congress a bill (H. R. 10225) was introduced into the House and with amendments was favorably reported upon by the House Committee on Public Lands (House Report 993 of the First Session of the Fifty-sixth Congress), but no further action was taken on this bill. Likewise a bill (S. 1610) was at this session introduced into the Senate and referred to the Committee on Public Lands, but no further action was taken on this bill.

On May 29, 1900, the bill (H. R. 11973, First Session of the Fifty-sixth Congress) which became the Act of 1901, was introduced into the House in the same form as the Act now stands. This bill was passed without debate in either the House or the Senate and with only a short report by the Committee on Public Lands, which referred to the bill (H. R. 10225) and quoted the language of the Secretary of the Interior given above. The report then continued:

"The result of the above-stated conflict of statutes has produced the anomaly that while forest reserves are being set aside to preserve watersheds and increase the water supply, the same legislation has denied its use in and for the industries calculated to be benefited thereby. This bill corrects this condition by extending the opportunities to use these waters to mining, electrical, domestic, public and any other beneficial uses.

"The committee, therefore, unanimously recommend the passage of the bill as amended."

This report is interesting in view of the apparent contention of the Interior Department that the so-

called Irrigation Act of 1891 was not intended to be affected by this Act, and that all permits for other uses than irrigation were intended to be revocable by the Secretary in his discretion. This report covers irrigation as well as other beneficial uses.

The Act of February 15, 1901, was evidently intended to clear up the confusion on the subject, to put all the uses therein mentioned on the same footing, as far as practicable, for administrative purposes; and, it is respectfully submitted that this might have been done, and might still be done, by a fair, liberal and logical construction and administration of the Act. The purpose of the Act evidently was to permit the Secretary to do this very thing,—to authorize or permit him to reserve rights of way for all the purposes named in the Act in accordance with the procedure already established, but at the same time to provide that the public lands should not be encumbered by virtue of the mere permission of the Secretary indicated by his approval of maps, but only by the actual utilization of the permitted right of way in the interests of the development of the country.

The Act of February 15, 1901, recognizes that rights of way for the purposes therein specified may not be inconsistent with the purposes for which certain parts of the public land are reserved by the Federal Government, including even military and Indian reservations, and authorizes the Secretary of the Interior to permit the use of such easements upon the approval of the chief officer having supervision thereof. But the unreserved public lands, and forest reservations (by the express provisions of the Act of June 4, 1897), are subject to the free operation

of local laws with respect to the appropriation of water and easements therefor. And, while the Secretary of the Interior is authorized by this Act to permit or reserve such easements, either before or after construction, for every conceivable purpose for which water may be used, including irrigation, yet any administrative interpretation of this Act which denies the right to appropriate such easements, or the right to apply the water to any purposes recognized by the local law, or which attempts to impose any charge upon such use, or any limitation upon the period of such use, is an unwarranted and unconstitutional encroachment upon the reserved powers of the States to control the appropriation and use of their waters for all beneficial purposes except navigation. That a right to the use of water and the essential easements on the public land for such use vested under the local laws, without any permit or approval of maps, had been the uniform ruling of the land office as well as of the courts.

The Act covers a great variety of uses, and one in particular which instead of becoming perpetual during the period of use was by the express terms of the Act "subject to the provisions of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain;" and this proviso was properly restricted to commercial telegraph lines (34 L. D. 232, 693, 695). Under Section 5267, U. S. R. S., the United States has the right to purchase telegraph lines for postal, military or other purposes.

"At an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Post Master General of the United States, two by the company interested, and one by the four so previously selected."

This is, therefore, the only exception to the rule that any rights acquired for the purposes mentioned in this Act become permanent after construction, and are not subject to revocation or purchase by the Government, for *expressio unius exclusio est alterius*.

The purposes covered by the Act are as follows:

1. Electrical plants, poles and lines for the generation and distribution of electrical power (Act of 1896).

2. Telephone and telegraph purposes.

3. Canals, ditches, pipes and pipe lines, flumes, tunnels and other water conduits (Act of 1866)

4. Water plants, dams and reservoirs used to promote

- (a) irrigation (Act of 1891);

- (b) mining or quarrying (Act of 1895);

- (c) manufacturing or cutting of timber or lumber (Act of 1895);

- (d) supplying water for domestic, public or any other beneficial uses (Acts of 1898 and 1866).

Such a construction and administration of the Act would have been in harmony with the manifest intent of the Act; not in substantial conflict with any prior legislation on any of the matters embraced in the Act, none of which legislation is expressly re-

pealed by the Act, and none of which should be held to be repealed by implication unless such implication is unavoidable; and finally, in harmony with the Federal Constitution, and not in derogation of any just claims of the States in the development of their resources, and in harmony with the spirit of our institutions as a government of law and not of men.

The holding of the court in the *Utah Power & Light Case*, *supra*, that the Act of May 14, 1896, repealed the Act of 1866 *pro tanto*, when the water is used for one particular purpose, would seem to necessitate a like holding that the Act of February 15, 1901, repealed the Act of 1866 *in toto*, as well as all other legislation on the subject when the water is used for any beneficial purpose, including irrigation, with the possible exception of the Act providing for the reservation from sale of reservoir sites to be used for watering stock. And yet such repeal can only be by implication, which is contrary to the plain intent of the Act as shown by its history and by all rational rules of interpretation, as well as in violation of the fundamental law of the land. Furthermore, the whole course of judicial decision, both State and Federal, with the sole exception of that case, and even the rulings in the Land Department itself, recognize the 9th section of the Act of July 26, 1866, as still continuing in full force and effect, and that the Act of March 3, 1891, and the amendment of May 11, 1898, remain unaffected by the Act of February 15, 1901.

It should also be noted that there are two prior Acts on similar subjects which are not covered by the Act of February 15, 1901, which are referred to in the

regulations of June 27, 1900, 30 L. D. 325, 335, namely, the Act of May 21, 1896 (29 Stat. 127), and the Act of January 13, 1897 (29 Stat. 484). See, also, Regulations, 36 L. D. 567, and instructions, 38 L. D., 597. The former of these Acts relates to oil pipe lines on public domain in Colorado and Wyoming, and a similar Act was made applicable to Arkansas April 12, 1896 (29 Stat. 127). These Acts are similar to the right-of-way Act of March 3, 1891. They provide for the approval of maps by the Secretary of the Interior and notation upon the plats in the local land office, "and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way," and the regulations under the Act of March 3, 1891, are applied to these Acts.

The Act of January 13, 1897, provided for the reservation from sale by the Secretary of the Interior of reservoir sites not exceeding 160 acres, for watering stock, upon the filing of a declaratory statement, "so long as such reservoir is kept in repair and water kept therein." In the case of *Marsh v. Rambousek*, 40 L. D. 599, March 1, 1912, it was held that the Secretary might reform a reservation of 160 acres for a reservoir under this Act, and restore to entry and sale all land not actually occupied. The reservoir actually constructed and used was said to contain only 4.18 acres. This decision is doubtless correct in principle, but any entry and sale after restoration would be, by the express terms of the patent of the United States, "subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection

with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts," and subject to the use of the reservoir by the appropriator, if the local laws recognize, as they do in Utah, an appropriation for the purpose of watering stock. And any conflict as to the extent of the appropriation between the entryman and the appropriator could only be decided by a court of competent jurisdiction. The use for this purpose is, therefore, perhaps as transient as any use of water could be, but the administration of this Act, even if the reservoir were included in a forest reserve, is certainly within the jurisdiction of the Secretary of the Interior. And, as we shall see later, the administration of all Acts affecting the title or permanent interests within forest reserves remains in the office of the Secretary of the Interior, including all laws affecting the appropriation of water for any beneficial use.

It should also be noted that this Act limits the size of a reservoir reserved for watering stock to 160 acres. The Acts of Congress do not place any limitation upon the size of reservoirs used for other purposes, and such a limitation would be manifestly absurd. This may be a further reason for holding that the limitation of forty acres of ground in the Act of May 14, 1896, applied to the power station grounds, and not to reservoirs.

General legislation, intended to encourage and promote the development of the country, should receive such a construction, both by administrative officers and the courts, as will permit the accomplishment of such a desirable purpose, and not such as will defeat it.



The regulations adopted after the passage of the Act of February 15, 1901 (31 L. D. 13), however, treat that Act as superseding all prior legislation on the subject of reservations of rights of way, except the Act of March 3, 1891, the second Section 2 contained in the Act of May 11, 1898, and the Act of January 13, 1897, and as making all permits for the uses therein mentioned except irrigation and watering stock, subject to arbitrary revocation by the Secretary at any time in his discretion, even after the rights have vested under the local laws. And thus an Act, intended as a help to development, has become a hindrance and a hardship.

It should also be noted that it was not under the Act of May 14, 1896, but under the Act of February 15, 1901,—and then only after the lapse of several years,—that the Secretary began to assume the monstrous power of making regulations which required the applicant for a permit to sign an agreement by which he should be bound to pay charges fixed by the Secretary in his discretion, by which he should consent that his rights should terminate at the end of a certain period, or at any time sooner within the discretion of the Secretary, and by which he should agree to sell his property to the Secretary's nominee at a price to be fixed by the Secretary. It is such regulations as these that the defendant is asked to comply with, or, as prayed in the bill, be enjoined from operating its plant until it does comply.

The reasons for the proviso at the end of this Act, that the *permission* of the Secretary should not of itself be held to confer any right, interest or easement

in the public land, have already been explained, and that it was only intended that he should have power to revoke an unused permission, and not that he should have power to revoke in his discretion any rights which had vested by virtue of construction and use under the local law. The Railroad Act of 1875 and the Act of 1891 were held, as already pointed out, to authorize a grant of an easement which could only be revoked by legislative and judicial action, and this proviso was added to avoid such complications.

This difficulty was well pointed out in the report of the Commissioner of the General Land Office to the Secretary of the Interior on Senate Bill 1610 of the First Session of the Fifty-sixth Congress, introduced in December, 1899. The Commissioner of the General Land Office, in his report, dated May 9, 1900, said:

“At low estimate, there have been approved under the act of 1875, about 60,000 miles of railroad and about 30,000 acres of station grounds. Of these rights of way it is safe to say that less than one-half have been utilized, or ever will be, by the applicants. Yet the grants remain effective in the absence of a declaration of forfeiture by legislative or judicial act. To obtain a declaration of forfeiture by bringing suit would be a very expensive and tedious process. Meanwhile the lands crossed by the lines of these unused rights of way are subject thereto and they remain a cloud upon the title that can be removed only by the action of the Government. The same condition exists as to right of way for irrigation purposes, though on a much smaller scale, as the Act has been in force but nine

years. These existing unused rights often interfere with enterprises that would otherwise be promptly carried out."

As said by Justice Shiras in *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 219:

"Even in construing the terms of a statute, courts must take notice of the history of legislation, and out of different possible constructions select and apply the one that best comports with the genius of our institutions, and is therefore most likely to have been the construction intended by the law-making power."

Our Government is a government of law, and not a government by any man or set of men, and everything that savors of arbitrary power is repellent to it. The arbitrary powers claimed by the Federal departments under the Act of February 15, 1901, are equally repugnant to the spirit of our institutions, and destructive of the enterprises which the Act was intended to encourage.

*The Reclamation Act of June 17, 1902*, foreshadowed in the legislation of 1888 and 1890, providing for the reservation of reservoir sites, contains a recognition that even in its own projects for reclaiming its arid lands, in order to render them salable the Government must comply with the local laws respecting the appropriation of water. Section 8 of this Act, quoted in full in *Gutierrez v. Albuquerque Land Co.*, 188 U. S. 545, 554, and said by Mr. Justice (now Chief Justice) White to illustrate reflexively the purpose of previous legislation, is as follows:

"Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government, or of any land owner, appropriator, or user of water in, to, or from any inter-state stream or the waters thereof. *Provided*, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Finally, in complete recognition of the right of the State of Utah to control the appropriation and use of the waters within its boundaries for all beneficial purposes, even on land over which the United States retained jurisdiction, the *Act of June 21, 1906* (34 Stat. 375), in making, *inter alia*, an appropriation for irrigation systems in certain Indian reservations in the State of Utah, contained the following proviso:

*"Provided*, That such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah, and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians, and he may

sue and be sued in matters relating thereto; *and, provided*, further, That the ditches and canals of such irrigation systems may be used, extended or enlarged for the purpose of conveying water by any person, association or corporation under and upon compliance with the provisions of the laws of the State of Utah."

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- (e) *Act of February 1, 1905, Sections 1 and 4 (33 Stat. 628).*

"Sec. 1. That the Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled 'An Act to repeal the timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands.

Sec. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores during the period of their beneficial use, under such rules and

regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated."

What are the laws referred to in Section 1 of this Act which are excepted from the transfer, and the administration of which remains, where it was before, in the Department of the Interior?

In its original form as introduced, at the President's request, in the House (H. R. 8460, Cong. Record, December 12, 1904, page 166), the laws excepted were "such laws as affect the surveying, entering, relinquishing, reconveying, certifying or patenting of any such lands." In the Senate on January 17, 1905, the following words were inserted after surveying, "prospecting, locating, appropriating."

The surveying of the public lands is an essential preliminary step to their disposition, and is under the charge of the Surveyor General. The other words relate to the acquisition by grant or by appropriation of some permanent interest or easement in the lands. All of these things were under the jurisdiction of the Interior Department, and there they remain. Only the administration of Acts affecting temporary uses of the forest reserve lands or their products was transferred to the Department of Agriculture.

A letter of the Secretary of the Interior to the Secretary of Agriculture of June 8, 1905, bears the initials of Frank L. Campbell, Assistant Attorney General, and F. W. Clements, both of whom had served for many years in the Department, and defines the respective jurisdiction of the Departments over

applications for rights and privileges within forest reserves. The letter as it appears in 33 L. D. 609, 619, is as follows:

*Secretary Hitchcock to the Secretary of Agriculture,*

(F. L. C.)      June 8, 1905.      (F. W. C.)

"In further reply to your letter of April 28, 1905, and after an informal conference between the law officer of the Forestry Bureau of your Department and the Assistant Attorney General for this Department, I have to advise you that it is believed the respective jurisdictions of the two Departments over applications for rights and privileges within forest reserves may be safely defined as follows, namely, that your Department is invested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a forest reserve which occupation or use is temporary in character, and which, if granted, will in nowise affect the fee or cloud the title of the United States should the reserve be discontinued, but that this Department retains jurisdiction over all applications affecting lands within a forest reserve the granting of which amounts to an easement running with the land, with the further understanding that any permission or license granted by your Department is subject to any later disposal of the land by this Department. Within the limits of the separate jurisdictions herein defined, it is believed that the actions of the two Departments will proceed harmoniously.

"This Department would be pleased to be informed as to whether these views coin-



cide with the views of your Department, and whether you have any further suggestions to make in the premises."

"By letter of June 13, 1905, the Secretary of Agriculture expressed his concurrence in the views herein set forth."

However, in disregard of the express provisions of the Act of February 1, 1905, and of the letter above quoted, and in violation of the State laws which declare that the right to use water is vested during the period of beneficial use, the Department of Agriculture began to treat such rights as temporary and to attempt to exercise an unwarranted jurisdiction and control over them, through an illogical construction of the Act of February 15, 1901.

The only land decision of which we are aware in which the Act of February 1, 1905, has been construed with reference to the jurisdiction of the respective Departments within forest reserves is that of *H. H. Yard*, 38 L. D. 59, July 3, 1909, in which it was held that the Department of the Interior continued to exercise jurisdiction over the laws affecting the *prospecting, locating* and patenting of mining claims, and by necessary inference over reservations for rights of way in connection with the *appropriating* of water on the forest reserves. At page 65:

"Congress, by act of February 1, 1905 (33 Stat. 628), entitled 'An Act providing for the transfer of forest reserves from the Department of the Interior to the Department of Agriculture,' enacted that the Secretary of the Department of Agriculture should execute or cause to be executed all

laws affecting public lands embraced in forest reservations—'excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying or patenting of any of such lands.'

The terms of this Act clearly contemplate that within forest reserves (now national forests) those laws affecting the surveying, entering and patenting of lands shall continue as theretofore to be executed by and under the supervision of the Interior Department; and also all such laws as affect *prospecting, locating and appropriating* any such lands. Here is an express congressional declaration reserving to the land department the execution and enforcement of those laws governing the latter class of acts in the same terms and with no element of distinction as are employed with reference to the former, the departmental jurisdiction over which no one will question. The legislative announcement recognized the right, authority, power and jurisdiction as already existent and vested and declares that such power and authority shall remain where now seated, viz: with the Interior Department."

The words of exception in the Act all have a definite meaning in the land laws of the United States. For instance, in *Southern Pacific Company*, 28 L. D. 281, at 283, illustrating the meaning of the word "entering":

"The words 'entry' and 'filing' are technical terms having a well defined meaning, and employed in the various acts pertaining to the disposal of the public domain, to

indicate the act by which an individual acquires an inceptive title to a portion of the public lands under the general land laws."

See also:

*Hastings v. Whitney*, 132 U. S. 357, 363.

Likewise the words "prospecting and locating," which relate to the discovery and claiming by location on the ground of mineral lands; and in the same connection the most appropriate word is used for the acquisition of easements in connection with the use of water—"appropriating"—the mines and waters being associated together in the minds of lawyers ever since the Act of 1866, which in its ninth section recognized the arid region doctrine of appropriation. The right to water and easements under this doctrine is permanent, during the period of beneficial use; and reservations for the purpose of protecting such proposed appropriations are still under the jurisdiction of the Secretary of the Interior. The right itself vests by construction and use, and not by virtue of the reservation or permit of the Secretary.

And, as held in *Battlement Reservoir Co.*, 29 L. D. 112, overruling 12 L. D. 79, the provision requiring the filing of maps within a certain time after survey if the work is done on unsurveyed land is directory and not mandatory; for "the filing of a map is requisite only to protect the grantee from claims by other parties." 39 L. D. 27, 33 (1910). In referring to such easements on the public land, the court says, in *Ortman v. Dixon*, 13 Cal. 33, 38:

"We hold the absolute property in such cases to pass *by appropriation as it would pass by grant.*"

In *Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 525, the court said at page 531:

"By the constitution and laws of Colorado, State and Territorial, from the earliest times, rights to the beneficial use of water from natural streams have been acquired by diversion through prior appropriation rather than by grant."

The local necessities in the arid and mining regions of the West created the law that the man who could put the water to service must be permitted to do so. In the literal meaning of the word, he is permitted to *appropriate* it, to acquire by use the right of use. That such is the basis of the right under the western doctrine of appropriation is recognized in the constitutions and laws of the western States, in the decisions of their courts, and in repeated decisions of this Court.

In his *Lectures on Legal History*, pp. 193-194, on the Nature of Ownership, Professor Ames explains the legal philosophy of this doctrine with characteristic clearness and accuracy. He says:

"Only he in whom the power to enjoy and the unqualified right to enjoy concur can be called an owner in the full and strict sense of the term. The correctness of this conclusion is confirmed by the opinion of Blackstone, expressed with his wonted felicity. After speaking of the union in one person of the possession, the right of posses-

sion, and the right of property, he adds: 'In which union consists a complete title to lands, tenements and hereditaments. For it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum* or *droit droit*. And when to this double right the actual possession is also united, there is, according to the expression of Fleta, *juris et seisinæ conjunctio*, then, and only then, is the title completely legal.'

"A true property may, therefore, be shortly defined as possession coupled with the unlimited right of possession. If these two elements are vested in different persons there is a divided ownership. Let us test these results by considering some of the modes by which a perfect title may be acquired by one who has neither, or only one of these two elements of complete ownership.

"The typical case of title by original acquisition is title by occupation. For the occupier of a *res nullius* does acquire a perfect title and not merely possession. The fisherman who catches a fish out of the sea, or the sportsman who bags a bird, is at once absolute owner. He has possession with the unqualified right of possession, since there is no one *in rerum natura* who can rightfully interfere with him."

As said in *Wallbridge v. Robinson*, 22 Idaho 236-241:

"We think it is clear that the title to the public waters of the State is vested in the State for the use and benefit of all the citi-

zens of the State under such rules and regulations as may be prescribed from time to time by the law-making power of the State. This is not, however, an interest or title in the proprietary sense, but rather in the sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity."

Section 4 of the Act was, it is believed, due largely to the ruling in the case of the *Town of Delta*, 32 L. D. 461, February 20, 1904. The application of the town for approval of maps under the Acts of 1891 and 1898, to supply its inhabitants with water for domestic and other purposes was denied, because it was not a corporation formed for the purpose of irrigation. The Act of February 15, 1901, provided for rights of way for "the supplying of water for domestic, public or any other beneficial uses," but that Act had unfortunately been construed so as to defeat its purpose entirely, by holding that the Secretary retained an indefinite power of revocation.

In his letter submitting the application to the Secretary the Commissioner made the following statement, page 462:

"Surely a municipal corporation applying for right of way to supply its town with water is entitled to as much consideration as an individual or association of individuals applying for right of way for irrigation purposes; and as the estate granted by the said Acts of March 3, 1891, and May 11, 1898, is

of a more permanent character than that granted by the said Act of February 15, 1901, it would seem as though municipal corporations might properly invoke the superior protection of the former acts."

Section 4 of the Act of February 1, 1905, is merely a recognition of the control of the local law, which, however, if strictly construed, would obviate this ruling of the Land Department only in case the proposed reservoir or canal were within a forest reserve, and would still leave a municipality at the mercy of the Secretary of the Interior under the fatuous construction placed on the Act of February 15, 1901, for a water supply outside of forest reserves. And yet a use could hardly be conceived which is in its nature more permanent than for a municipal water supply, and none more necessary to the very existence of the municipality and the State.

The decision in the *Town of Delta* case shows how utterly illogical is the construction placed by the Department on the Act of February 15, 1901.

In the case of the *Northern California Power Co.*, 37 L. D. 80, July 31, 1908, an application was made for reservoir and pipe line in the Shasta National Forest under the Act of February 1, 1905. The application was referred to the Forester, and was rejected on his report, with leave to amend so as to bring it under the Act of February 15, 1901, to be submitted for final disposition to the Department of Agriculture. At page 81 the decision says:

"This Act was evidently drawn in the sole interests of municipalities and miners, and the limitations upon the use of the priv-



ilege granted are such as to authorize, if not demand, special scrutiny of the purposes of the projectors of the enterprise before giving approval to an application filed under said act."

The word "purpresture" is used in the bill of complaint as a reason for equitable jurisdiction. But history should inform the pleader that the only reason why the chancellor had jurisdiction in cases of purpresture was that the property trespassed upon was the king's forests, or other lands, such as the soil under navigable waters, and that all of the king's property and affairs, even common debts, were under the immediate protection of the chancellor. Thus, by retrogressive steps, we are taken back to the days of William the Conqueror, Henry I, Stephen and John; and a policy which prevailed in England before Magna Charta is sought to be inaugurated here. One of the provisions in the charter of Henry I at the time of his coronation in 1100 was that:

"10. The forests shall be retained in my hands by the common consent of my barons, as my father held them. (*Forestas communi consensu Baronum meorum in manu mea retinui, sicut pater meus eas habuit.*)"

See Stubbs' *Select Charters*, page 101.

And in the second charter of King Stephen in 1136, in the first year of his reign, it was provided, *Stubbs' Select Charters*, page 120:

"The forests which William, my grandfather, and William, my uncle, created and held, I reserve to myself. All others which King Henry superadded, I give back and

yield up to the peaceable possession of the church and the realm." (*Forestas quas Willelmus avus meus et Willelmus avunculus meus instituerunt et habuerunt, mihi reserco. Ceteras omnes quas rex Henricus superaddidit ecclesiis et regno quietas reddo et concedo.*)

And as said by the learned author, *Stubbs' Select Charters*, page 156:

"The forests of England were regarded, at least from the time of the Conquest, as the peculiar and personal property of the king, subject to his uncontrolled jurisdiction, and out of the scope of the common law of the realm. In origin, they were probably the remaining unenclosed woodlands which had been national property, and became royal demesne in the eleventh century."

Trespases on these royal forests were called *purprestures*, from the old French verb *pourprendre* (past participle, *pourpris*), signifying to encompass or enclose, and defined by *Stubbs' Select Charters*, 156, 159.) The punishments prescribed by this assize of Henry II are said by the author to be that part of his administration that savors most strongly of tyranny.

Finally, these intolerable abuses were abolished by the terms of the Great Charter, wrung from a reluctant tyrant by the barons at Runnymede in 1215.

The 46th and 48th Sections of *Magna Charta* are, in English, as follows:

"47. All forests that have been made forests in our time shall forthwith be deforested; and the same shall be done with the water banks (*ripariis*, i. e., rivers), that have been fenced in by us in our time."

"48. All evil customs concerning forests, warrens, foresters, and warreners, sheriffs and their officers, rivers and their keepers, shall forthwith be inquired into in each county, by twelve sworn knights of the same shire, chosen by creditable persons of the same county; and within forty days after the said inquest, be utterly abolished, so as never to be restored; so as we are first acquainted therewith, or our justiciary, if we should not be in England."

Bishop Stubbs, in his *Select Charters*, at page 347, says that the first Forest Charter was issued by the Earl Marshall in the name of King Henry III, November 6, 1217.

"The notion," he says, "that John issued a Forest Charter distinct from the forest clauses of the Great Charter, although very ancient is erroneous; the document given in Matthew Paris under that name being merely the Forest Charter of Henry III with an altered salutation. As an important piece of legislation it must be compared with the Forest Assize of 1184, and with the 44th, 47th and 48th clauses of the Charter of John. It is observable that most of the abuses which are remedied by it are regarded as having sprung up since the accession of Henry II, but the most offensive afforestations have been made under Richard and John. These latter are at once disafforested; but those of Henry II only so far as they had beer

carried out to the injury of the landowners, and outside of the royal demesne."

Article 4 of this charter provided as follows:

"4. The archbishops, bishops, abbots, priors, counts and barons and knights and freeholders, who have their own woods in the forests, shall have their woods as they had them at the time of the first coronation of the aforesaid King Henry, our ancestor, so that they may be released forever (*quieti sint in perpetuum*) from all purprestures, wastes and clearances done in said woods from that time to the beginning of the second year of our coronation. And those who thereafter shall have committed any waste, purpresture, or clearance therein without our permit (*sine licentia nostra*) shall answer for such wastes or clearances."

See also *Blackstone's Commentaries*, Book III, page 44:

"*Chancery. Ordinary jurisdiction.* The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown."

The case of *Attorney General v. Richards*, 2 Anstruther, 603 (1794), is a typical case of equitable jurisdiction of purprestures under the old English law. The defendant in that case had erected a wharf or key, two docks and other buildings, between high and low water mark in Portsmouth Harbor, without a permit.

"This information stated that, by the royal prerogative, the sea and sea coasts, so far as the sea flows and reflows, between the high and low water marks, and all the ports and havens of the Kingdom, belong to his Majesty, and ought to be preserved for the use of his Majesty's vessels, and others, and that his Majesty has the right of superintendency over them, for their preservation."

In his opinion in this case Chief Baron MacDonald, in commenting on the distinction between purprestures and nuisances, says:

"But it is argued that the prayer of the bill being to abate the erections as a nuisance, the court can only consider that question, as alone supporting the relief prayed; and it is contended that this court cannot give such a decree, or at least, not without the intervention of a jury, the question of nuisance being, as laid down by Lord Hale, a question of fact and not of law. That may be, where the question is of nuisance only, and the evidence doubtful. But the cases cited, and those which Lord Hale has given us, in the treatise *De Portibus Maris*, clearly prove that where the King claims and proves a right to the soil, where a purpresture and a nuisance have been committed, he may have a decree to abate it."

And in that case the court, as a matter of law, the soil being the King's, issued a decree abating the structures complained of.

But, as we have already seen, the soil under navigable waters belongs in this country to the States by virtue of their inherent sovereignty, and their re-

served power to control their waters; and the soil within the national forests, or any other public lands, not devoted to some legitimate Federal use, is subject to a right of easement exercised by the States or under their laws in the appropriation of their waters to beneficial uses. The mere fact of Federal ownership does not confer equitable jurisdiction, as if over the King's forests in old England.

The great Act of July 26, 1866, the Magna Charta of the West, which declared the mines to be free and open to exploration and development, and the waters to be free and open to appropriation for all beneficial uses under the local laws, has not been repealed. And we maintain that, so far as the waters within the States are concerned, that Act was merely declaratory of the pre-existing law.

The material losses suffered by the public-land States through the retrogressive policy of the administrative branch of the Federal Government during the past few years can hardly be estimated in dollars and cents; but a far more serious danger is threatened to the political life and autonomy of these States if such arbitrary powers are recognized by the courts as possible under our form of government.

It is not believed that our national history can furnish a parallel of such perversion of beneficial legislation from its original purpose as that herein set forth, or of such administrative encroachment upon the just rights and liberties of the States and the people. The nearest parallel which history affords is believed to be the tyrannical jurisdiction exercised over the forests and rivers of England by the Norman kings before the Great Charter. But, in

that "scepter'd isle," the laws and customs which were overridden were the unwritten laws of a constitution in the process of making, in a land blessed with the spirit of political liberty; while with us the policy sought to be now established is subversive of a written Constitution, which, in a more enlightened age, was expressly designed to prevent the exercise of arbitrary or despotic power in any form.

It was said by Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635, that unconstitutional practices get their first footing by silent approaches and stealthy encroachments; that it is the duty of the courts to guard against them, and that "their motto should be *obsta principiis*." And referring thereto another of the illustrious departed members of this Court said: "We shall do well to heed the warning of that great jurist."

Although these words were used with reference to the protection of the rights of citizens against the unconstitutional actions of the Federal Government, they apply with even greater force to the preservation of the constitutional powers of the States against encroachment by the Federal Government.

Indeed, it is only by restraining, as well as by upholding, each sovereignty in the exercise of all its just powers, and no more, that the very framework of our dual form of government can be maintained; and it is only through its benign and harmonious operation that the equal rights, privileges and immunities of all the citizens of this great Republic can be secured, not only for the present but for all future generations.



(f) *Comparison of So-called Permissible Procedure under Right-of-Way Acts of Congress with Permit System under State Laws.*

The right to appropriate water is a right guaranteed by the constitutions and laws of the western States, and of necessity should carry with it the right to make use of the necessary easements over all public lands not required by the Federal Government for its own use. And a paper permit or reservation by the Secretary of the Interior can have no greater force in giving or withholding title to the easement than a paper permit or license from a State Engineer in giving or withholding title to the use of the water, in those States in which the permit system prevails. Both have reference to notice and priority. Neither conveys any title of itself. Beneficial use alone is the basis of the right to the water as well as to the easement.

*Nielson v. Parker*, 19 Idaho, 727;

*Lockwood v. Freeman*, 15 Idaho, 395;

*Youngs v. Regan*, 20 Idaho, 275;

*Gard v. Thompson*, 21 Idaho, 485;

*Crane Falls Co. v. Snake River Co.*, 24 Idaho, 77;

*Sowards v. Meagher*, 37 Utah, 212.

Quoting from the case in 24 Idaho, at page 77, decided June 21, 1913:

"Under the laws of this State, there are two methods of acquiring water rights: (1) To proceed as the statute directs; (2) To apply unappropriated water to a beneficial

use without making application to the State Engineer."

Chapter 2, Title 9, Water Rights and Irrigation, of the Idaho Revised Codes, 1908, under the head of Appropriation of Water, contains this provision, from the Session Laws of 1903:

"Sec. 3252. All rights to divert and use the waters of this State for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter. And after the passage of this title, all the waters of this State shall be controlled and administered in the manner herein provided."

The succeeding sections provide for the filing of applications to appropriate water with the State Engineer, the issuance of permits, certificates of completion of works and application to beneficial use, and a formal license by that officer, which last "shall be binding upon the State as to the right of such licensee to use the amount of water mentioned therein, and shall be *prima facie* evidence as to such right."

Yet, notwithstanding these elaborate and seemingly mandatory provisions, the Supreme Court of Idaho has repeatedly held that a water right may be acquired by actual appropriation to a "beneficial use without making application to the State Engineer," for the fundamental reason that it is provided in Section 3 of Article XV of the Idaho Constitution that "the right to divert and appropriate the unappropriated waters of any natural stream shall never be denied. Priority of appropriation shall give the better right as between those using water."

*Nielson v. Parker, supra.*

An appropriation of water is the making of the right to use water one's own by using it. It is not the ruthless taking of something for nothing. It is the application to beneficial uses, under the control of State laws, of one of the vital resources of the State which would otherwise remain unused, with an implied obligation on the part of a public service corporation to perform the public service for which the appropriation was made, actual use being in all cases a basic condition of the right. Such appropriation necessarily involves the expenditure of labor and funds, and often, in large enterprises, of vast sums of money, thus contributing largely to the taxable wealth of the State. Such enterprises are of a quasi-public nature, and not only is their property subject to taxation under the revenue laws of the State and under the income-tax law, but they are subject to regulation as to rates and service by the State if intrastate and by the Nation if interstate. Furthermore, their financial success depends upon furnishing service to the community at lower cost than other kinds of power, and thus indirectly they aid in the general development of other industries, and therefore tend to the increase of other forms of taxable wealth in the State and to the furnishing of employment to thousands of men who might otherwise be compelled to remain idle.

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### III.

*The Regulations of the Departments, Assuming Complete Control of the Development of Water Powers on the Public Domain, Are Unauthorized, Unconstitutional, and Void.*

The latest published, and, it is assumed, the existing regulations of the two Departments appear in the

Transcript, Department of the Interior, pages 32-64, and Department of Agriculture, pages 64-134. In general scope and purpose, as well as in minor details, they are practically identical. They both derive their alleged authority from the Act of February 15, 1901, the Secretary of Agriculture assuming (Transcript, page 64) that the Act of February 1, 1905, vested in him jurisdiction and authority for the purposes mentioned, within forest reservations.

In a general statement contained in the Regulations of the Department of the Interior (Transcript, page 34) the following legislative declaration is made:

"7. Any occupancy or use of public lands, reservations, parks, or national forests for the purposes set forth in the statute, except under authority first secured from the proper department, is trespass."

Regulation 19 (Transcript, page 51, substantially the same as Regulation L-19, page 81) provides:

"Reg. 19. Violation by a final permittee of any of the provisions of these regulations, or of any of the conditions of a permit issued to him thereunder, shall be sufficient ground for revocation of such permit; but attention is called to the statute under which these regulations are issued, which provides:

"That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or by his successor in his discretion."

"No permit will be deemed to be revoked except on the issuance by the Secretary of a specific order of revocation. Change of jurisdiction over lands from one executive depart-

ment to another will not revoke but will change the administrative jurisdiction over a permit for the occupancy and use of such lands. The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provision of said act."

Thus the Executive Departments of the Federal Government, taking advantage of the necessities of the States in the development of their public uses, through a misuse of its proprietary trusteeship in the public land within the States, are not only attempting to usurp governmental powers through the ingenious device of compelling private persons, who under the authority of the States are developing and serving such public uses, to enter into contracts in which such governmental powers are asserted and assented to, but by these same contracts, or "use agreements," they are endeavoring to prolong such usurpation of the lawful powers of the States beyond the time when the trust shall have been discharged by the final disposal of the title to the soil.

These asserted powers are of the very essence of municipal jurisdiction, sovereignty and eminent domain, using those words in the same sense in which they are used in *Pollard, Lessee, v. Hagan*, 3 How. 212, 223; and, as declared in that case, if the State itself as a condition of entering the Union should agree to surrender such powers to the Federal Gov-

ernment, such stipulation would be void and inoperative. The doctrine of that case has frequently been affirmed by this Court, from the date of its decision down to the present time, and it is controlling in this case. If the State itself could not surrender these powers to the United States, how much less could this be done by the contract of a private citizen.

It will be noted, moreover, that the regulation above quoted makes bold to use the word "jurisdiction," whereas the 1901 statute in its first *proviso*, referring to "any of said parks or any forest, military, Indian, or other reservation," speaks of the chief officer having *supervision* thereover. The Act of 1897, authorizing withdrawals from sale or entry of lands valuable for forest purposes, expressly provides that they shall remain under the jurisdiction of the State in which they are situated; that no person shall be prohibited from entering thereon "for all lawful and proper purposes including that of *prospecting, locating, and developing* of mineral resources thereon," and that all waters thereon "may be used," that is, *appropriated*, "under the laws of the State wherein such forest reservations are situated." And, as already observed, in discussing the Act of February 1, 1905, the administration of all laws affecting, among other things, the "*prospecting, locating and appropriating*" of any of such lands—evidently referring to the mining laws and to appropriations in connection with the use of water, which have always been associated together in the minds of lawyers—was not transferred to the Department of Agriculture but was left where the Act found it.

This is in accordance with the policy of the Act, which was intended to transfer only the transient and

temporary care of the forests to the Department of Agriculture, and to leave the administration of all laws affecting the title or easements of a public and permanent nature in the hands of the Secretary of the Interior. And, as further evidence of this intent, in the Fourth section of this very Act, providing for certain rights of way for which the Secretary of the Interior had held he was not authorized to approve maps under the Act of 1891 and amendments, the right to make appropriation for the purposes mentioned is recognized "during the period of their beneficial use, under such rules and regulations as may be prescribed by the *Secretary of the Interior*, and subject to the laws of the State or Territory in which said reservations are respectively situated."

It was under this Act that the promise was held out to the defendant that its maps of right of way would be approved in the event of the creation of the forest reservation within the boundaries of which defendant's plant is now situated.

The underlying purpose of the present suit, as shown by the prayer of the bill, is to compel the defendant to comply with "the Rules and Regulations promulgated by the Secretary of the Department of Agriculture relating to National Forests" (Transcript, page 6); and, as before shown, the law vests in the Secretary of Agriculture no authority whatever over the subject-matter. The jurisdiction—the right to declare the law on the subject—is in the States; and, while the Secretary of the Interior is empowered by certain legislation to aid and encourage appropriations of water by reserving rights of way therefor in



any conveyance, either before or after the appropriation is completed, he is not authorized by any legislation to hinder such appropriation, or to impose any charges or conditions thereon, much less to prohibit, or to terminate in his discretion, an appropriation once made.

If permission is granted by him under the Act of 1901 and not utilized within a reasonable time by the applicant, the statute authorizes him to revoke the permission, and properly declares that such permission shall not be "held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." The right or easement vests only by construction and use under the local law, and the Secretary is not authorized by this Act, nor is it within the power of Congress to authorize him, to revoke and cancel the vested right.

The regulations under discussion, however, assume that the Acts of Congress vest in the Secretaries what we contend is vested solely in the States under the Constitution, namely, all governmental power over the subject, over the tenure, the manner and the purpose of the appropriation, and the regulation of rates and service, including all such powers as are usually exercised by public-utilities commissions.

The regulations speak for themselves, and we only call attention to the fact that they assume the broadest exercise of governmental powers. They are not authorized by the statutes under consideration, for they have no direct relation whatever to the purposes for which the forest reserves were authorized to be created, nor to the powers conferred upon executive departments in connection therewith. As said by this

Court in *United States v. Grimaud*, 220 U. S. 506, 522:

"The Secretary of Agriculture could not make rules and regulations for any and every purpose. *Williamson v. United States*, 207 U. S. 462. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized 'to regulate the occupancy and use and to preserve the forests from destruction.' A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress."

Although the statute confers no power on the Secretary to impose a charge or tax upon the use of the water or the incidental right of way, nor to derive any revenue therefrom indirectly, yet the regulations prescribe as a condition to the Secretary's consent that the permittee shall agree to pay an annual charge, fixed by the arbitrary discretion of the Secretary, and subject to change at his will. The power to tax is the power to destroy; but, disregarding the arbitrary character of this asserted power, and disregarding the fact that it is properly within the function of the legislature, and not of the executive, and cannot be delegated, and that it is, if regarded as a tax, subject to the constitutional limitation that it shall be uniform throughout the United States, it is, nevertheless, a charge which, if valid, must be ultimately borne by

the consumers, the citizens of the State. For it is a charge or tax which is a part of the operating or other costs and expenses of the public-service company for which it may legitimately recoup itself in its rates to the public. Even granting, *arguendo*, that Congress may impose such tax, yet it cannot delegate its power of taxation and other governmental powers to the arbitrary and uncontrolled discretion of the Secretary, and the usurpation of such power cannot be too strongly condemned.

The regulations, in effect, seek to regulate a public use within a State, and are in direct conflict with the power of the State to declare and control such uses. In the case of *Offield v. N. Y. N. H. & H. R. Co.*, 203 U. S. 372, in which a state statute authorizing the condemnation of shares of a minority stockholder in a railroad company was upheld, this Court, per McKenna, J., said, at page 377:

"The power of the State to declare uses of property to be public has lately been decided in *Clark v. Nash*, 198 U. S. 361, and in the case of *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527. These cases exhibit more striking examples of the power of a State than the case at bar. In the first case the statute of the State permitted an individual to enlarge the ditch of another to obtain water for his own land; in the second case the statute authorized the condemnation of a right of way to transport ore from a mine to a railroad station. In the first case it was said that the public policy of the State, declaring the character of use of property, depends upon the facts surrounding the subject. In the second case it was said, com-

menting on the first, 'It proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent.' "

Again, in sustaining recovery of damages for violation of a State statute prohibiting the grazing of sheep on the public domain within two miles of a dwelling house, in the State of Idaho, this Court said, in *Bacon v. Walker*, 204 U. S. 311, 315:

"The laws and policy of a State may be framed and shaped to suit its conditions of climate and soil. Illustrations of this power are afforded by recent decisions of this court. In *Clark v. Nash*, 198 U. S. 361, a use of property was declared to be public which, independent of the conditions existing in the State, might otherwise have been considered as private. So also in *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527. In the first case there was a recognition of the power of the State to deal with and accommodate its laws to the conditions of an arid country and the necessity of irrigation to its development. The second was the recognition of the power of the State to work out from the conditions existing in a mining region the largest welfare of its inhabitants."

Surely the power of the State to work out, from the existing conditions of climate and soil, the largest welfare of its inhabitants, should not be limited by the

mere accident of Federal ownership of vacant lands within its borders; and this power should receive at the hands of this Court as broad an interpretation in this regard, as has been placed upon the power of the National Government over navigation with respect to the title of the State to lands underlying navigable waters.

If the Federal Government may collect a charge or tax from a power company because some of its easements traverse vacant public land, it may impose a similar charge or tax for any beneficial use of water; for the Act of 1901 covers all uses. For instance, in the case of *Clark v. Nash, supra*, it might under the same Act require the farmer to pay over to it a percentage of his produce, increasing from year to year, or from moment to moment, and require him to give it an option on his land, in which no appreciation in value of the land itself should be considered, and the improvements should be assessed at their depreciated value at the time when the option might be exercised. In the case of *Strickley v. Highland Boy Gold Min. Co., supra*, if the mining company's tramway happened to cross vacant public land, which is by no means an unusual occurrence, the Federal Government might with equal reason, as a condition of permit, require the mining company to enter into an agreement whereby it should be bound to pay so much per ton annually, as the Secretary might determine, for all ore transported over its tramway, and to give to the Federal Government an option on its tramway, mines, and all other property used and valuable in connection therewith at their original cost, deducting

any depreciation in the value of the improvements on their property.

These are not far-fetched suppositions. They are the logical consequence of the system which is sought to be inaugurated by the regulations under discussion. Carried to its ultimate logical conclusion, the result of such a system would be that the territory over which a State of the Union once held sovereign sway and jurisdiction, which was supposed to be as indestructible as the Union itself and under its protecting shield, would become a province inhabited by a race of tenants and permittees. Its internal development and destiny would be in the hands and at the mercy of the far-distant bureaus in Washington, and dominated locally, perhaps, by subordinates armed with arbitrary power. The rule of law, established, interpreted and enforced by agents of the people's choice, would be supplanted by the rule of men, in whose selection they would have no voice and over whose acts they would have no control.

Further argument and citation of authorities against a situation so appalling would seem to be a work of supererogation.

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#### IV.

##### *Conclusion.*

There are, however, two further suggestions which should be decisive of this case, and which will doubtless be fully argued by counsel for the appellant, and we make mention of them here mainly because they are founded in principles of equity and fair deal-

ing between man and man, and concern the honor of our common country. The facts in the case show the appellant's good faith, its expenditure of a large sum of money, in reliance upon the Government's interpretation of its laws which implied its consent thereto, and upon the virtual promise of the officers of the Federal Government to allow it to exercise its rights of appropriation during the period of beneficial use under the local laws.

As said by Judge McLean, in *Woodruff v. Trapnall*, 51 U. S. (10 How.) 190, 207:

"We naturally look to the action of a sovereign State, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals."

And it has been repeatedly held that when a sovereign sues, it brings with it no privileges which exempt it from the application of equitable principles.

That a license upon which expenditures have been made, and which is in its nature permanent, cannot be revoked, is based on considerations of equity.

As said by Judge Gresham in *Indiana v. Milk*, 11 Fed. 389, 397:

"Resolute good faith should characterize the conduct of States in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel."



Regarded in a broader light, these same principles should apply to the conduct of the Federal Government toward the new States with respect to the public uses over vacant public lands. The laws of the States, affecting their internal development in many intimate ways as well as affecting property rights, have been built up in reliance upon the oft-repeated declarations of Congress and the acquiescence of the Federal Government for more than a century, that the States should not be hampered, obstructed or in any manner burdened in the exercise of their constitutional powers over such matters. This sound and beneficent construction of the Constitution should not now be disturbed, but should be so affirmed that it may never again be questioned, either in the legislative, executive or judicial departments of the Government.

We print in an appendix, for convenience of reference, some of the Acts of Congress herein discussed, and also, as indicative of the general interest of the States joining in this brief, the resolutions adopted at the Conference held at Portland, Oregon, September 21-23, 1915. The Conference was called by the Governor and legislature of the State of Oregon, and the following-named States responded to the call by sending delegates: Arizona, California, Colorado, Idaho, Montana, Nebraska, New Mexico, North Dakota, Oregon, Utah, Washington and Wyoming.

We respectfully pray the Court to consider this brief as an argument not only in this case, but in all cases of a like character now pending in this Court,

or which may be brought here by proper proceedings  
before a final determination of this cause.

Respectfully submitted :

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**Appendix.**

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I.

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**EXTRACTS FROM UNITED STATES STATUTES.**

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## 1.

**CHAP. CCLXII. AN ACT GRANTING THE  
RIGHT OF WAY TO DITCH AND CANAL  
OWNERS OVER THE PUBLIC LANDS, AND  
FOR OTHER PURPOSES, APPROVED JULY  
26, 1866.**

*14 U. S. Stats. at L. 251.*

**Sec. 9.** *And be it further enacted,* That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed; *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

CHAP. CCXXXV. AN ACT TO AMEND "AN ACT GRANTING THE RIGHT OF WAY TO DITCH AND CANAL OWNERS OVER THE PUBLIC LANDS, AND FOR OTHER PURPOSES," APPROVED JULY 9, 1870.

*16 U. S. Stats. at L. 217.*

Sec. 17. *And be it further enacted*, That none of the rights conferred by Sections five, eight, and nine of the Act to which this Act is amendatory shall be abrogated by this Act, and the same are hereby extended to all public lands affected by this Act; and all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the Act of which this Act is amendatory. But nothing in this Act shall be construed to repeal, impair, or in any way affect the provisions of the "Act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

(NOTE: The foregoing sections as codified appear in the Revised Statutes as Sections 2339 and 2340.)

## 3.

CHAP. 561. AN ACT TO REPEAL TIMBER-CULTURE LAWS, AND FOR OTHER PURPOSES, APPROVED MARCH 3, 1891.

26 U. S. Stats. at L. 1095, 1101-2.

Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch; *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories.

Sec. 19. That any canal or ditch company desiring to secure the benefits of this Act shall, within twelve months after the location of ten miles of its

canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Sec. 20. That the provisions of this Act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch or reservoir, as in case of a corporation, with the name of the individual owner, or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this Act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal, or

ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture.

Sec. 21. That nothing in this Act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance and care of said canal or ditch.

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4.

For the purpose of more direct comparison we print below in parallel columns the Acts of January 21, 1895, and May 14, 1896, on one side, and the supplemental Act of May 11, 1898, on the other:

ACT OF MAY 11, 1898.

(U. S. Stat. at Large, vol. 30,  
p. 404.)

CHAP. 292.—AN ACT TO  
AMEND AN ACT TO PER-  
MIT THE USE OF THE  
RIGHT OF WAY THROUGH  
PUBLIC LANDS FOR TRAM-  
ROADS, CANALS, AND  
RESERVOIRS, AND FOR  
OTHER PURPOSES.

*Be it enacted by the Senate  
and House of Representatives  
of the United States of Amer-  
ica in Congress assembled, That  
the Act entitled "An Act to  
permit the use of the right of  
way through the public lands  
for tramroads, canals, and res-*

ACT OF JANUARY 21, 1895.

(U. S. Stat. at Large, vol. 28,  
pp. 635-636.)

CHAP. 37.—AN ACT TO PER-  
MIT THE USE OF THE  
RIGHT OF WAY THROUGH  
THE PUBLIC LANDS FOR



**TRAMROADS, CANALS,  
AND RESERVOIRS, AND  
FOR OTHER PURPOSES.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That* the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber.

Approved January 21, 1895.

ervoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservation, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public and other beneficial uses."

NOTE: It is quite obvious that the foregoing portion of the Act of May 11, 1898, being in broader terms than the Act of January 21, 1895, set opposite, was intended to supersede that Act.

The enacting clause is here repeated before the new section 2, added to the Act of January 21, 1895, in order that it may more plainly appear

ACT OF MAY 14, 1896.  
(U. S. Stat. at Large, vol. 29,  
p. 120.)

CHAP. 179.—AN ACT TO  
AMEND THE ACT AP-  
PROVED MARCH THIRD,  
EIGHTEEN HUNDRED AND  
NINETY-ONE, GRANTING  
THE RIGHT OF WAY UPON  
THE PUBLIC LANDS FOR  
RESERVOIR AND CANAL  
PURPOSES.

*Be it enacted by the Senate  
and House of Representatives  
of the United States of Amer-  
ica in Congress assembled, That  
the Act entitled "An Act to per-  
mit the use of the right of  
way through the public lands  
for tramroads, canals, and res-  
ervoirs, and for other pur-  
poses," approved January twen-  
ty-first, eighteen hundred and  
ninety-five, be, and the same is  
hereby, amended by adding  
thereto the following:*

from the juxtaposition that  
the new section 2 was proba-  
bly meant to supersede, at  
least in part, the original sec-  
tion 2, added to that Act by the  
Act of May 14, 1896; that the  
contemporary construction to  
this effect, placed upon the Act  
of May 11, 1898, by the In-  
terior Department, was in all  
probability the correct con-  
struction, in so far as it relates  
to ditches, canals, and reser-  
voirs; but that in so far as it re-  
lates to station sites and trans-  
mission lines, the Act of May  
14, 1896, remains unrepealed;  
and that, as its history shows,  
the latter was a perfect recog-  
nition of the underlying prin-  
ciple that the right to appro-  
priate water on the public  
lands, including forest reserves,  
carries with it all the inci-  
dental easements which are, or  
may be, required in order to  
put the water to the broadest  
beneficial use.

*Be it enacted by the Senate  
and House of Representatives  
of the United States of Amer-  
ica in Congress assembled, That  
the Act entitled "An Act to  
permit the use of the right of  
way through the public lands  
for tramroads, canals, and res-  
ervoirs, and for other pur-  
poses," approved January twen-  
ty-first, eighteen hundred and  
ninety-five, be, and the same is  
hereby, amended by adding  
thereto the following:*

"SEC. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power."

Approved, May 14, 1896.

As shown by the history of the Act of May 14, 1896, as well as from the body of the Act itself, the purposes for which the Secretary was authorized to permit rights of way were public purposes; and if that Act can be said to relate to ditches and canals at all, it was superseded in that respect by the Act of May 11, 1898, which expressly provided for a reservation of rights of way for ditches, canals and reservoirs for purposes of a public nature,—which are, of course, of an essentially permanent character.

"SEC. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act, entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

Approved May 11, 1898.

## 5.

CHAP. 335. AN ACT TO PROVIDE FOR THE  
USE AND OCCUPATION OF RESERVOIR  
SITES RESERVED, APPROVED FEBRU-  
ARY 26, 1897.

*29 U. S. Stats. at L. 599.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective states and territories in which such reservoirs are in whole or part situate.

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6.

CHAP. 372. AN ACT RELATING TO RIGHTS  
OF WAY THROUGH CERTAIN PARKS,  
RESERVATIONS, AND OTHER PUBLIC  
LANDS, APPROVED FEBRUARY 15, 1901.

*31 U. S. Stats. at L. 790.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Con-*

*gress assembled*, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs, used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided fur-*

*ther*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

---

## 7.

CHAP. 1093. AN ACT APPROPRIATING THE RECEIPTS FROM THE SALE AND DISPOSAL OF PUBLIC LANDS IN CERTAIN STATES AND TERRITORIES TO THE CONSTRUCTION OF IRRIGATION WORKS FOR THE RECLAMATION OF ARID LANDS, APPROVED JUNE 17, 1902.

32 U. S. Stats. at L. 388.

Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner,

appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

---

8.

CHAP. 288. AN ACT PROVIDING FOR THE  
TRANSFER OF FOREST RESERVES FROM  
THE DEPARTMENT OF THE INTERIOR TO  
THE DEPARTMENT OF AGRICULTURE,  
APPROVED FEBRUARY 1, 1905.

33 U. S. Stats. at L. 628.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That the Secretary of the Department of Agriculture shall, from and after the passage of this Act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the Act entitled "An Act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and Acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying or patenting of any of such lands.

Sec. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants,



ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

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## II.

### RESOLUTIONS ADOPTED AT CONFERENCE OF WESTERN STATES, HELD AT PORT- LAND, OREGON, SEPTEMBER 21-23, 1915.

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"Whereas, The new states admitted into the Union are of necessity upon an equal footing in all respects whatever with the original states; and

"Whereas, Each state has full jurisdiction over all lands within its borders, including the beds of streams and other waters; and

"Whereas, The ownership by the Federal Government of the technical title to vacant public land within a state does not confer upon the Federal Government any greater or other governmental powers than it possesses within the original states; and

"Whereas, The long-established and sound policy of the United States with respect to the disposition of its unappropriated public lands is opposed to the

making of a direct revenue therefrom, beyond the expense incident to the surveying, classification and disposing of such lands, but, on the contrary, that said policy is intended to encourage and promote the settlement and development thereof, and that any act of Congress, or any administrative interpretation thereof, which is not in harmony with this policy does an injustice to the new states by placing them on an unequal footing with the original states, and by discouraging and preventing the settlement of such new states and the development of their resources; and

“Whereas, The vacant land belonging to the Federal Government constitutes two-thirds of the area of the states represented in this conference, and amounts to more than twice the area of the thirteen original states; and

“Whereas, The vacant lands belonging to the Federal Government are under the law exempt from taxation, while the burden of maintaining local government over their entire area rests upon the states; and

“Whereas, The maintenance inviolate of the constitutional equality of the states of the Union is essential to that balance of power on which the perfection and endurance of our political fabric depend, and to the harmonious operation of the scheme upon which the Republic was organized; now, therefore, be it

“Resolved, That we are unalterably opposed to any legislation which is in conflict with the fundamental principles above declared.

“Resolved, That the states have the constitutional right and power to control and regulate the appropriation and use of the waters within their boundaries for all beneficial purposes except navigation, and also the right and power to control and regulate the rates and service of their public utilities.

“Resolved, That we are opposed to any policy that looks toward imposing the system of leasing generally upon the public domain for the reason that such system is contrary to the spirit of our free institutions, and would retard the development of the resources of the states in which there is still any public land.

“Resolved, That in view of what we believe to be administrative misconstruction of existing legislation, we are in favor of a declaratory act by Congress recognizing and acknowledging that the proprietary interest of the United States in the vacant land within the states is subject to the jurisdiction and eminent domain of those states for all uses which are declared by the laws of those states to be public uses and which are so essential to the development, well-being and prosperity of those states.

“Resolved, That the purposes of encouraging the development and utilization of the natural resources of the country by private enterprise which actuated Congress in the enactment of the right-of-way acts of July 26, 1866, and March 3, 1891, and in the enactment of the acts of March 3, 1877, and June 4, 1897, making all non-navigable waters on public lands, including forest reservations, free for appropriation for beneficial uses, should actuate Congress today in the enactment of any further legislation upon these subjects.

"Resolved, That any legislation by Congress, the purpose or effect of which is to substitute arbitrary or discretionary authority of executive officials for the fixed rules of law governing the administration, sale or other disposition of public lands and reservation and rights-of-way over the same will be unwise and inconsistent with the spirit of our Constitution.

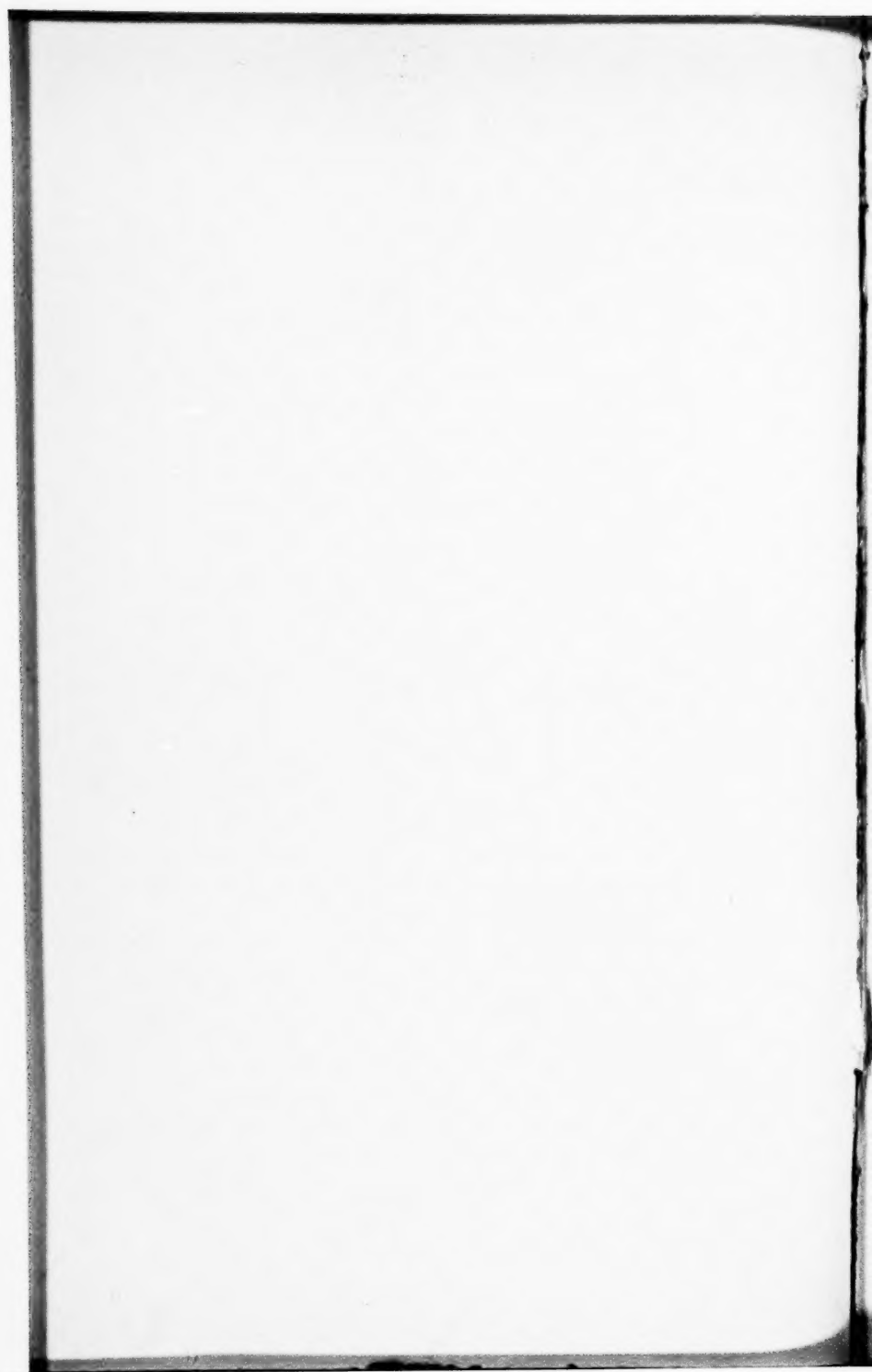
"Resolved, That we are opposed to ownership or control either direct or indirect by the United States Government of intrastate public utilities.

(Signed) WILLIAM SPRY,  
Chairman.

(Signed) C. C. CHAPMAN,  
Secretary."

ALBERT R. BARNES,  
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*Of Counsel.*



FILED

JUN 5 1916

JAMES D. MAHER

CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1915.

THE BEAVER RIVER POWER COMPANY,  
*Appellant,*

VS.

THE UNITED STATES,

*Appellee.*

No.

204

THE UNITED STATES,

*Appellant,*

VS.

THE BEAVER RIVER POWER COMPANY,  
*Appellee.*

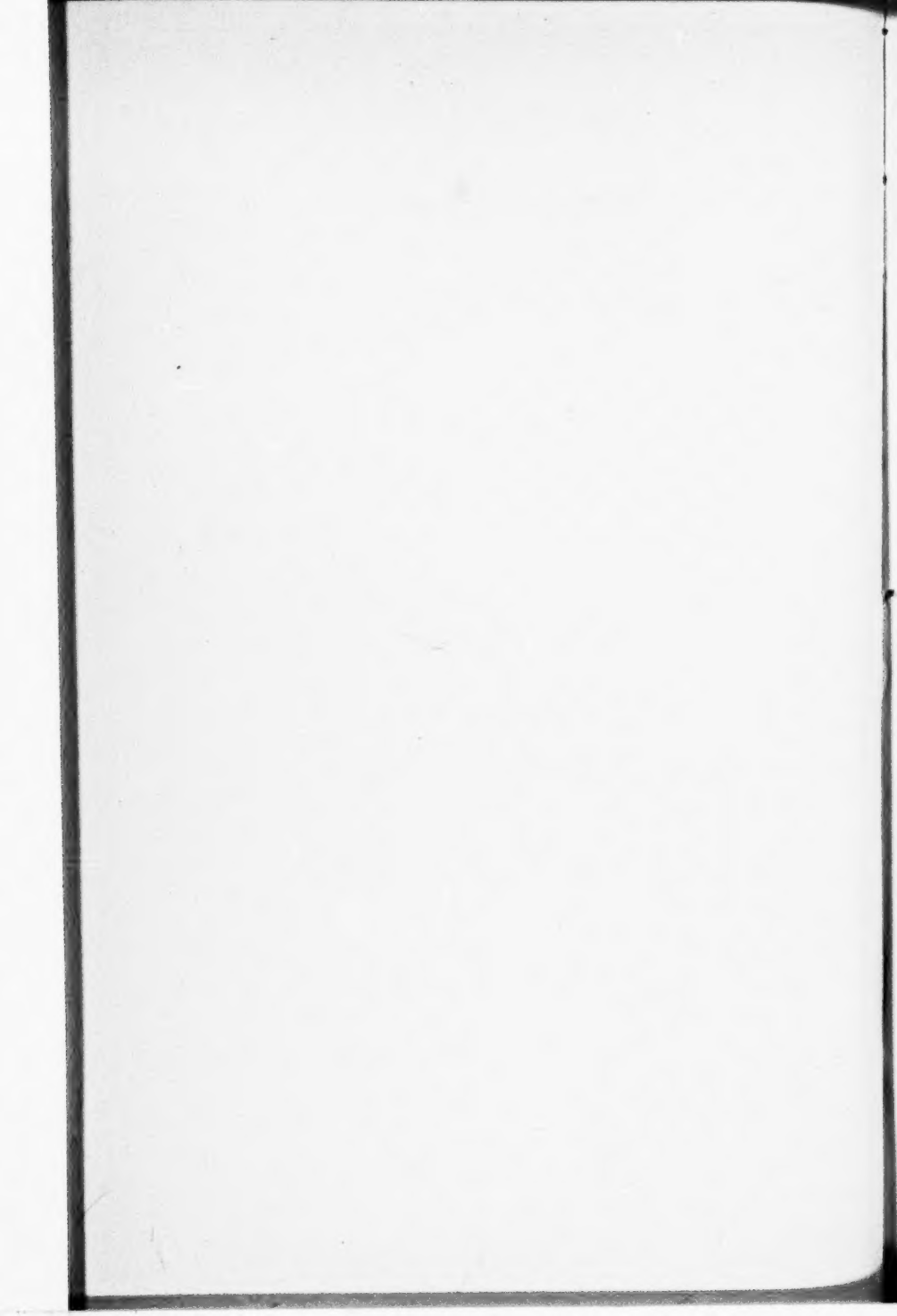
No.

205

*Appeals from the District Court of the United States,  
for the District of Utah.*

**BRIEF SUPPORTING APPEAL OF THE  
BEAVER RIVER POWER COMPANY**

WILLIAM B. BOSLEY,  
*Amicus Curiae.*  
San Francisco, California





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Proposition No. 1. The following Acts of Congress, viz:

Sections 2339 and 2340 of the United States Revised Statutes;

An Act entitled, "An Act to Provide for the Sale of Desert Lands in Certain States and Territories," approved March 3, 1877 (19 U. S. Stat. at L. 377);

Sections 18 to 21 of an Act entitled, "An Act to Repeal Timber-Culture Laws, and for Other Purposes," approved March 3, 1891 (26 U. S. Stat. at L. 1095, 1101-3);

An Act entitled, "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Ninety-eight, and for Other Purposes," approved June 4, 1897 (30 U. S. Stat. at L. 11, 34-36);

Section 2 of an Act entitled, "An Act to Amend an Act to Permit the Use of the Right of Way Through Public Lands for Tramroads, Canals, and Reservoirs and for Other Purposes," approved May 11, 1898 (30 U. S. Stat. at L. 404);

operate as a grant, to all qualified grantees who accept the same by complying with the terms and conditions therein prescribed, of a right of way over or a determinable fee in such public or forest

reserve lands as are located, appropriated and actually used for reservoirs, canals and other aqueducts for impounding, storing, diverting and conveying water to be used for the generation of electric power ..... 6

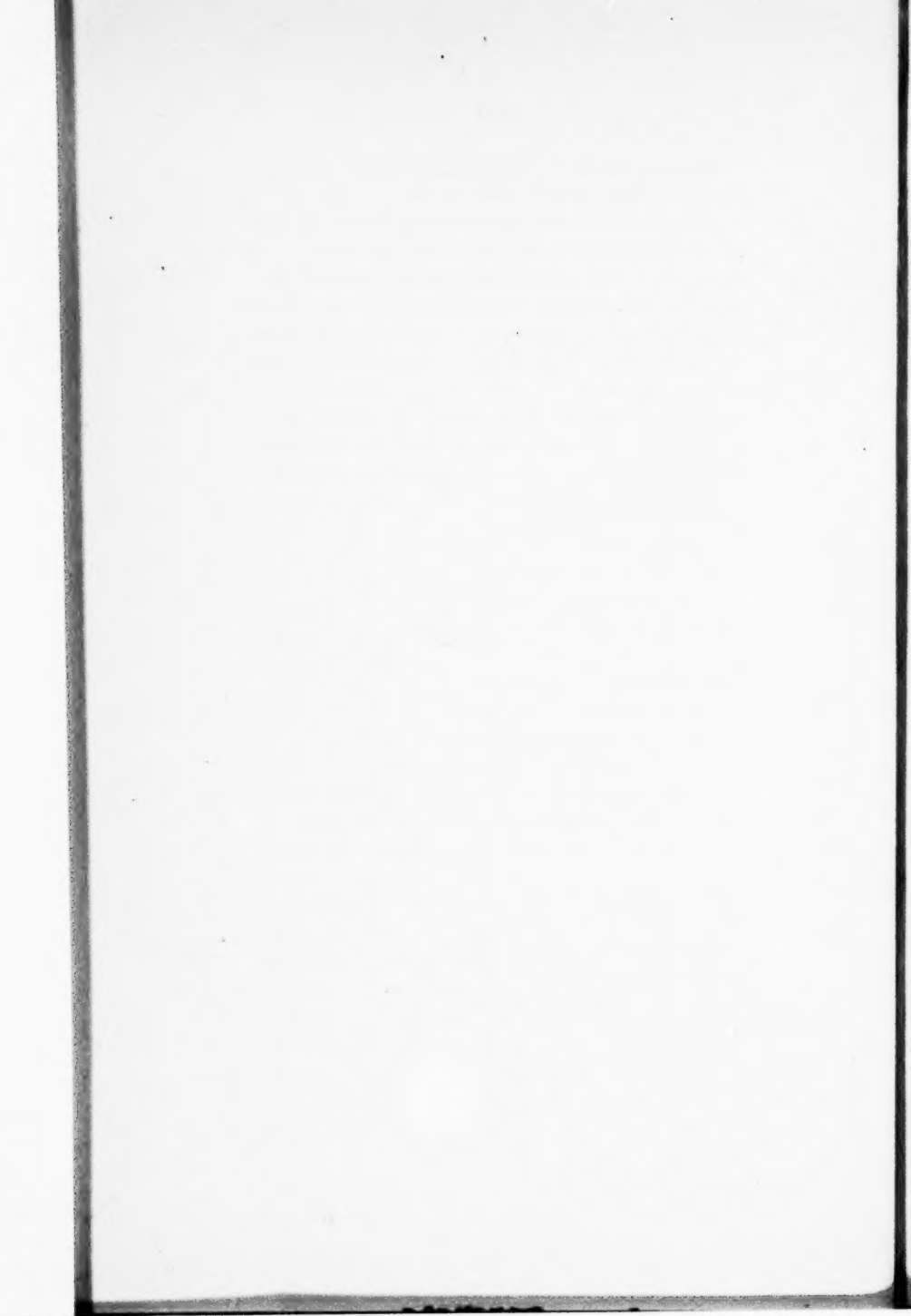
Proposition No. 2. Defendant's location and appropriation of the public or forest reserve lands involved in this suit, and its construction thereon of the reservoir, pipe lines and other water conduits mentioned in the complaint, and its subsequent use of such reservoir, pipe lines and water conduits for impounding, storing, and conveying the water of Beaver River to defendant's power house where it is used for the generation of electric power, constituted an acceptance of the grant offered by the aforesaid Acts of Congress, and resulted in vesting in defendant good title to the right of way or determinable fee granted by said Acts of Congress..... 21

Proposition No. 3. The Act of Congress entitled, "An Act Relating to Rights of Way Through Certain Parks, Reservations, and Other Public Lands," approved February 15, 1901 (31 U. S. Stat. at L. 790) is not to be construed as substantive legislation superseding and by implication repealing the aforesaid Acts of Congress ..... 24

Proposition No. 4. The aforesaid Act of February 15, 1901 (assuming that it is substantive legislation superseding and by implication repealing the other Acts of Congress already mentioned) is unconstitutional as involving an unauthorized delegation, to executive officers of the United States, by Congress, of power specifically and exclusively conferred by the Constitution upon the latter ..... 59

### XIII

Proposition No. 5. The aforesaid Act of Congress of February 15, 1901 (assuming that it is substantive legislation superseding and by implication repealing the other aforesaid Acts of Congress and is not unconstitutional) is itself superseded and repealed, so far as it applies to rights of way for reservoirs and aqueducts appropriated for "municipal," that is to say public or governmental, uses, by section 4 of an Act entitled, "An Act Providing for the Transfer of Forest Reserves from the Department of the Interior to the Department of Agriculture," approved February 1, 1905 (33 U. S. Stat. at L. 628).....



IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1915.

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THE BEAVER RIVER POWER COMPANY,  
*Appellant,*

vs.

THE UNITED STATES,

*Appellee.*

No. 574.

---

THE UNITED STATES,

vs.

THE BEAVER RIVER POWER COMPANY,  
*Appellee.*

*Appellant,*

No. 575.

---

*Appeals from the District Court of the United States,  
for the District of Utah.*

---

**BRIEF BY WILLIAM B. BOSLEY, AMICUS CURIAE,  
SUPPORTING APPEAL OF THE BEAVER RIVER  
POWER COMPANY.**

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*To Honorable Edward Douglass White, Chief Justice, and the  
Honorable Associate Justices of the Supreme Court of the  
United States:*

I respectfully ask leave, as amicus curiae, to file this brief  
for the reason that the decision to be rendered in this cause

will undoubtedly be determinative of some of the issues involved in a suit now pending in the United States District Court in and for the Northern District of California wherein Pacific Gas and Electric Company, whose attorney of record I am, is plaintiff and David F. Houston, Secretary of Agriculture et al., are defendants.

### STATEMENT OF THE CASE.

The decree appealed from in this case was entered pursuant to an order sustaining plaintiff's motion to strike defendant's answer to the bill of complaint.

The material facts admitted by plaintiff's motion to strike are, in substance, as follows, viz:

(1) That defendant is in the exclusive possession of certain lands situate in the Fillmore National Forest in the State of Utah, and is maintaining and operating thereon a hydro-electric power plant consisting of a power house, reservoir, certain pipe lines and conduits, and necessary adjuncts, by means whereof the water of Beaver River is appropriated and used for the generation of electric power;

(2) That the lands occupied and used by defendant for the purposes aforesaid are, unless title thereto has been acquired by defendant by virtue of its location, appropriation and use thereof under authority of certain Acts of Congress hereinafter mentioned, forest reserve lands of the United States;

(3) That construction of defendant's said power plant was commenced as early as June, 1905, and completed in the year 1908, and thereupon said plant was put into operation;

(4) That the electricity generated at said power plant has been distributed and sold by defendant to the public in the State of Utah for light and power purposes;



(5) That no permit for the construction and operation of said power plant or for the occupancy and use of said lands for the purposes aforesaid has ever been granted or issued by the Secretary of the Interior or by the Secretary of Agriculture pursuant to the Act of Congress of February 15, 1901, hereinafter considered, or pursuant to any other Act of Congress; and

(6) That defendant claims, by virtue of its location, appropriation, occupancy and use of the lands occupied by said reservoir, pipe lines and other conduits, power house and necessary adjuncts, and by virtue of certain Acts of Congress hereinafter considered, to be possessed of title to, or a permanent right of way for the occupancy and use of, the aforesaid lands for the maintenance and operation of its said power plant.

The decree of the District Court establishes and quiets, as against all claims of defendant, plaintiff's title to the aforesaid lands and enjoins and restrains defendant from maintaining and operating upon said lands its said power house, reservoir, pipe lines or conduits and necessary adjuncts.

Defendant's appeal from said decree involves, and its assignment of errors copied in the transcript raises, among others, the following questions, viz:

Question No. 1.—Do the following Acts of Congress, viz:

(a) Sections 2339 and 2340 of the United States Revised Statutes;

(b) An Act entitled, "An Act to Provide for the Sale of Desert Lands in Certain States and Territories", approved March 3, 1877, (19 U. S. Stat. at L. 377);

(c) Sections 18 to 21 of an Act entitled, "An Act to Repeal Timber-Culture Laws, and for Other Purposes", approved March 3, 1891, (26 U. S. Stat. at L., 1095, 1101-3);

(d) An Act entitled, "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Ninety-eight, and for Other Purposes", approved June 4, 1897, (30 U. S. Stat. at L., 11, 34-36);

(e) Section 2 of an Act entitled, "An Act to Amend an Act to Permit the Use of the Right of Way Through Public Lands for Tramroads, Canals, and Reservoirs, and for Other Purposes", approved May 11, 1898, (30 U. S. Stat. at L., 404),

operate as a grant, to all qualified grantees who accept the same by complying with the terms and conditions therein prescribed, of a right of way over or a determinable fee in such public or forest reserve lands as are located, appropriated and actually used for reservoirs, canals and other aqueducts for impounding, storing, diverting and conveying water to be used for the generation of electric power?

Question No. 2.—Did defendant's location and appropriation of the public or forest reserve lands involved in this suit, and its construction thereon of the reservoir, pipe lines and other water conduits mentioned in the complaint, and its subsequent use of such reservoir, pipe lines and water conduits for impounding, storing and conveying the water of Beaver River to defendant's power house where it is used for the generation of electric power, constitute an acceptance of the grant offered by the aforesaid Acts of Congress, and result in vesting in defendant good title to the right of way or determinable fee granted by said Acts of Congress?

Question No. 3.—Is the Act of Congress entitled, "An Act Relating to Rights of Way Through Certain Parks, Reservations, and Other Public Lands", approved February 15, 1901, (31 U. S. Stat. at L., 790) to be construed as substantive legislation superseding and by implication repealing the aforesaid Acts of Congress?

Question No. 4.—Is the aforesaid Act of February 15, 1901, (assuming that it is substantive legislation superseding and by implication repealing the other Acts of Congress already mentioned) unconstitutional as involving an unauthorized delegation, to executive officers of the United States, by Congress, of power specifically and exclusively conferred by the Constitution upon the latter?

Question No. 5.—Is the aforesaid Act of Congress of February 15, 1901, (assuming that it is substantive legislation superseding and by implication repealing the other aforesaid Acts of Congress and is not unconstitutional) itself superseded and repealed, so far as it applies to rights of way for reservoirs and aqueducts appropriated for "*municipal*", that is to say *public* or *governmental*, uses, by section 4 of an Act entitled, "An Act Providing for the Transfer of Forest Reserves from the Department of the Interior to the Department of Agriculture", approved February 1, 1905, (33 U. S. Stat. at L., 628)?

The pertinent parts of all of the aforesaid Acts of Congress and certain other Acts which will be referred to in the course of the argument will be found printed in chronological order in the appendix at the end of this brief.

#### SPECIFICATION OF ERRORS.

The decree appealed from is, I respectfully submit, erroneous in the following particulars, viz:

It involves a decision that the Acts of Congress mentioned in question no. 1 do not operate as a grant of a right of way over, or a determinable fee in, public or forest reserve lands for the construction, maintenance and use of reservoirs and canals to be used for generating electric power; that the location, appropriation and use of public or forest reserve lands for a reservoir or for

canals for the generation of electric power, do not, by virtue of the aforesaid Acts of Congress, result in the acquisition of a right of way over or a determinable fee in such lands; and, consequently, that questions nos. 1 and 2, *supra*, should be answered in the negative; or a decision that the aforesaid Act of February 15, 1901, is to be construed as substantive legislation superseding and by implication repealing the earlier Acts of Congress above mentioned, is not unconstitutional, and is not, so far as it relates to rights of way for reservoirs and canals appropriated and used for "municipal" purposes, superseded or repealed by section 4 of the aforesaid Act of February 1, 1905, and, consequently, that question no. 3 should be answered in the affirmative, and questions no. 4 and no. 5 in the negative.

#### ARGUMENT.

This argument will be confined to a discussion of the specific questions already stated and the specific errors already specified, and will be arranged under definite propositions which, in my opinion, set forth the true legal answers to the aforesaid questions and compel the conclusion that the decree appealed from is erroneous in the particulars specified and should, therefore, be reversed.

#### PROPOSITION NO. 1.

*The following Acts of Congress, viz:*

(a) *Sections 2339 and 2340 of the United States Revised Statutes;*

(b) *An Act entitled "An Act to Provide for the Sale of Desert Lands in Certain States and Territories," approved March 3, 1877, (19 U. S. Stat. at L. 377);*

(c) *Sections 18 to 21 of an Act entitled, "An Act to Repeal Timber-Culture Laws, and for Other Purposes," approved March 3, 1891, (26 U. S. Stat. at L. 1095, 1101-3);*

(d) *An Act entitled, "An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Ninety-eight, and for Other Purposes," approved June 4, 1897, (30 U. S. Stat. at L. 11, 34-36);*

(e) *Section 2 of an Act entitled, "An Act to Amend an Act to permit the Use of the Right of Way Through Public Lands for Tramroads, Canals, and Reservoirs and for Other Purposes," approved May 11, 1898, (30 U. S. Stat. at L. 404);*

*operate as a grant, to all qualified grantees who accept the same by complying with the terms and conditions therein prescribed, of a right of way over or a determinable fee in such public or forest reserve lands as are located, appropriated and actually used for reservoirs, canals and other aqueducts for impounding, storing, diverting and conveying water to be used for the generation of electric power.*

The general legislation of Congress concerning the right to appropriate water and rights of way for reservoirs and aqueducts consisted, prior to March 3, 1891, of section 9 of the Act approved July 26, 1866 (14 U. S. Stat. at L. 251) and section 17 of the Act approved July 9, 1870 (16 U. S. Stat. at L. 217) re-enacted as, and superseded by, sections 2339 and 2340 of the Revised Statutes, and the Act approved March 3, 1877 (19 U. S. Stat. at L. 377).

By these Acts, the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable was declared to be free and open for appropriation, diversion and use wherever appropriation of water was recognized by the local customs, laws and decisions of the courts as a means of acquiring the right to use the water so appropriated for bene-

ficial uses; and by these Acts Congress made an unequivocal grant of rights of way for the construction, maintenance and use of reservoirs, ditches and canals as a means of enabling the appropriators of water to impound and store, and to distribute and put to beneficial uses the water lawfully appropriated. This statement is sufficiently supported by the following cases, viz:

*Broder v. Natoma Water and M. Co.*, 101 U. S. 274;  
*Farley v. Spring Valley Mining and Irrigating Company*, 58 Cal. 142;  
*DeNecochea v. Curtis*, 80 Cal. 397, 399, 405;  
*Wood v. Etiwanda Water Company*, 122 Cal. 152, 157-8; and  
*Gutierrez v. Albuquerque Land and Irrigation Co.*, 188 U. S. 545.

In construing these Acts of Congress adopted prior to March 3, 1891, no distinction has ever been made by the courts of any of the states or of the United States between appropriators in respect to the use to which they devote the water appropriated by them, if only such use is a lawful beneficial use. In support of this statement I refer to the following authorities:

*Basey v. Gallagher*, 20 Wall. 670;  
*Cascade Town Co. v. Empire W. and P. Co.*, 181 Fed. 1011, 1016-8;  
 Same case on appeal, 205 Fed. 123, 128-9;  
*Black's Pomeroy on Water Rights*, sec. 48;  
*Farnham on Water and Water Rights*, sec. 668.

Moreover, if the construction of these Acts of Congress had not already been settled by judicial decisions, there would be no reasonable ground for doubting that the right to appropriate water "for mining, agricultural, manufacturing, and other purposes" includes the right to appropriate water to be used for the generation of electric power, as the electric

power generated by means of such water is itself used in manifold ways in mining, agricultural and manufacturing operations. From time immemorial the use of water for manufacturing purposes has consisted principally of its utilization in the generation of power for the operation of mills and machinery. The power of falling water has ever been received upon water-wheels, transmitted by means of shafts, belts, pulleys and cogwheels, which in turn have moved machinery, and thus used for manufacturing purposes. Falling water used by means of water-wheels operating dynamos for the generation of electric power which is transmitted by means of wires to great distances and ultimately utilized for operating mills and machinery surely is used for manufacturing purposes just as much as falling water whose power is transmitted by the older methods.

That the use of appropriated water for the generation of electric power is not only a beneficial use, but also a use for which water may lawfully be appropriated under the Acts of Congress hereinbefore mentioned and the laws, customs and judicial decisions of the states, is clearly established by the following decisions, viz:

United States *v.* Utah Power and Light Co., 208 Fed. 821;

Same case on appeal, 209 Fed. 554, 561;

Cascade Town Company *v.* Empire Water and Power Company, 181 Fed. 1011, 1016;

Thompson Co. *v.* Pennebaker, 173 Fed. 849, 853-4.

The decision of the United States Circuit Court of Appeals in the Eighth Circuit in *United States v. Utah Power and Light Company*, 209 Fed. 554, 561 (which reversed the decision of the District Court in the same case in 208 Fed. 821 upon another point) expressly declares that "the terms of the original statute (*i. e.*, the Act of July 26, 1866) are broad enough to include the specific form of manufacture now under consideration" (*i. e.*, the generation of electric power).



The above mentioned Acts of Congress constituted the entire body of the general statutes of the United States upon the subject of the appropriation of water and the acquisition of rights of way for reservoirs, canals and ditches by private citizens and corporations prior to the enactment of the Act of Congress entitled, "An Act to repeal timber culture laws and for other purposes," approved March 3, 1891 (26 U. S. Stat. at L. 1095). This Act of March 3, 1891, is important here because, in sections 18 to 21, it supplements the earlier legislation granting rights of way for reservoirs and canals, and also because, in section 24, it confers upon the President of the United States the power to set apart and reserve the vast areas of land which are now called "National Forests." The earlier Acts granting rights of way for reservoirs and aqueducts did not expressly mention reservations of the United States in connection with the grant of authority to appropriate water and rights of way for reservoirs and canals, or define the extent or limits of the rights of way thereby granted, or contain any provision for issuing to the appropriators any muniment or evidence of title or for making any public record of the rights of way located and acquired thereunder. Remedying these deficiencies in existing legislation, Congress, in sections 18 and 19 of said Act of March 3, 1891, granted a right of way of a definite width through public lands and reservations of the United States for reservoirs and canals to any canal or ditch company formed for the purpose of irrigation which should thereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, and made provision for the filing and approving of maps showing the location of the rights of way thereby granted and for the noting of the location of such reservoirs and canals upon the plats of the surveys of public lands of the United States in the land office for the District wherein the land affected by the rights of way is situated.

It should be noted in passing that it is expressly provided in section 18 of the Act of March 3, 1891, that "the privilege herein granted shall not be construed to interfere with the con-

trol of water for irrigation and other purposes under authority of the respective States or Territories." This declaration is a recognition by Congress of the right of the several states to regulate and control the appropriation and use of water for beneficial purposes and is substantially equivalent to the acknowledgment by Congress in the Act of July 26, 1866, of the legal force and effect of the local customs, laws and decisions of the courts of the several states concerning rights to the use of water.

The language employed in sections 18 and 19 of the Act of March 3, 1891, to grant rights of way for reservoirs and canals and to define the terms and conditions upon which the grant is made, is substantially the same as the language employed in the Railroad Right of Way Act of March 3, 1875 (18 U. S. Stat. at L. 482), a copy of which is printed at the end of the appendix to this brief, and should, therefore, be construed in like manner.

*De Weese v. Henry Investment Co.*, 39 L. D. 27, 32-3.

This Court, in the case of

*Jamestown and Northern Railroad Company v. Jones*,  
177 U. S. 125,

held that the Railroad Right of Way Act of March 3, 1875, operates as a direct grant of a right of way over the public lands which may be accepted by actual construction of a railroad without the filing of a map of location or having the same approved by the Secretary of the Interior.

This Court, in *Stalker v. Oregon S. L. R. Company*, 225 U. S. 142, 146, said that "the uniform construction of this Act (*i. e.*, the Railroad Right of Way Act) has been that it is a grant '*in praesenti* of lands to be thereafter identified.' "

Consequently, and for the same reasons, it should be held here that said Act of March 3, 1891, is a grant "*in praesenti* of lands to be thereafter identified."

The grant of rights of way for reservoirs and canals over public lands and reservations made by section 18 of the Act

of March 3, 1891, "to any canal or ditch company formed for the purpose of irrigation" is, by section 20 of the same Act, extended to "corporations, individuals or association of individuals" and made applicable "to all canals, ditches or reservoirs heretofore or hereafter constructed."

That the grantees entitled to claim the benefit of the rights and privileges granted by the Act of March 3, 1891, are not limited to "canal or ditch companies formed for the purpose of irrigation" has been expressly decided by the Supreme Court of the Territory of New Mexico in the case of the *United States v. Lee*, 110 Pac. 607 (see second paragraph of opinion on page 609), and is supported by the opinion of Assistant Attorney-General Campbell in 33 L. D. 563.

That the grant of rights of way made by the Act of March 3, 1891, is not limited to cases where the reservoirs or canals are to be used either exclusively or chiefly for the purpose of irrigation, but, on the contrary, extends to and includes rights of way for reservoirs and canals for storing and conveying water for any lawful beneficial use seems equally clear from the language of section 20.

This construction of the Act of March 3, 1891, is entirely consistent with the spirit and purpose of all of the earlier Acts of Congress upon this subject which, as we have seen, freely grant the right to appropriate water and necessary rights of way without making any distinction between the various beneficial uses to which, under state laws, the water may be applied, and furthermore is the only construction consistent with the declaration contained in the last clause of section 18 to the effect that the privilege therein granted shall not be construed "to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories."

There is, however, a series of rulings by the Secretary of the Interior to the effect that rights of way for reservoirs and canals are granted by the Act of March 3, 1891, only for the purpose of irrigation and may not be acquired or used under

that Act for any other purpose. These rulings appear to be based upon the fact that, in the granting clause contained in section 18 of this Act, the grantee is described as "any canal or ditch company formed for the purpose of irrigation."

That these rulings are erroneous appears from the following considerations: (1) Nowhere in this Act is it expressly stated that the rights of way thereby granted are to be used for the purpose of irrigation to the exclusion of other beneficial uses; (2) if the rights of way for reservoirs and canals granted by section 18 are to be used solely for the purpose of irrigation because the grantee is therein described as "any canal or ditch company formed for the purpose of irrigation," then it must be that rights of way granted by section 18 as supplemented by section 20 may be used for any purpose for which water may be lawfully appropriated, distributed and sold or used, because section 20 enlarges the class of grantees so as to make it include "corporations, individuals or association of individuals" generally and without any qualification or limitation and makes the provisions of the Act applicable to "all canals, ditches or reservoirs," and because the corporations, natural persons and associations included in the enlarged class of grantees provided for in section 20 possess, under the laws of the United States and the several states, the right to engage in and conduct the business of appropriating, storing, distributing and selling water to the public and the right to appropriate and use water for every purpose for which water may be beneficially used; (3) no reason has been suggested or occurs why Congress in 1891 should abandon the policy expressed in its previous legislation and grant rights of way for reservoirs and canals to be used for the sole purpose of irrigation upon any more favorable terms than for other lawful beneficial uses; (4) as the Act of March 3, 1891, neither expressly nor by implication, repeals the earlier Acts relating to the appropriation of water and the grant of rights of way for reservoirs and canals, and as under such earlier Acts any corporation or natural person had the right to appropriate

water and rights of way for reservoirs and canals upon the public lands of the United States for any and every beneficial use, and as sections 18 to 21 of the Act of March 3, 1891, are clearly remedial in their nature and intended to supply certain defects in the earlier legislation upon the subject, section 20 as well as the other sections should be liberally construed so as to give effect to the intent of Congress and to enable all corporations and natural persons to avail themselves of the benefits and privileges granted by the provisions of this Act; and (5) if the declaration contained in the first clause of section 20, "that the provisions of this Act shall apply to all canals, ditches or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals or association of individuals," is not to be construed as here indicated, it is difficult to conceive of any rational meaning to be attributed to it, and yet settled rules of construction require that effect shall, if possible, be given to every part of an Act of Congress.

Moreover the intent of Congress in enacting sections 18 to 21 of the Act of March 3, 1891, is reflexively illustrated by the Acts of June 4, 1897 (30 U. S. Stat. at L. 34-36) and May 11, 1898 (30 U. S. Stat. at L. 404) which supplement and amend said Act of March 3, 1891, and make it clear that Congress did not intend the benefits of the former Act to be availed of by irrigation companies alone.

The Act of June 4, 1897, which prescribes how and for what purposes public lands theretofore or thereafter set aside and reserved by the President under the authority conferred by section 24 of the Act of March 3, 1891, as public forest reservations, shall be controlled and administered, expressly provides that nothing therein contained shall "prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof," and further that "all waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the state wherein such forest reservations are situated, or under

the laws of the United States and the rules and regulations established thereunder."

The express grant made by the Act of June 4, 1897, of the right to enter upon such reservations for all lawful purposes and to appropriate all waters thereon "for domestic, mining, milling or irrigation purposes" includes, by necessary implication, a grant of all rights of way for reservoirs and aqueducts, which may be reasonably necessary and proper for the appropriation, distribution and use of such water. For the grant of water, timber or any other thing which is a part of the land, carries with it by implication as against the grantor such easements and servitudes affecting his land as are reasonably necessary and proper to enable the grantee to obtain and use the thing granted. See

*Hathorn v. Stinson*, 10 Maine 224, 25 Am. Dec. 228, 232;

*Prescott v. White*, 21 Pick. 341, 32 Am. Dec. 266, 268;

*Pine Tree Lumber Co. v. McKinley et al.*, 83 Minn. 419, 86 N. W. 414;

*Werling v. Ingersoll*, 181 U. S. 131, 141.

But it is not necessary to rely upon such implication alone, because the clause of this Act of June 4, 1897, which grants the right to use, for domestic, mining, milling or irrigation purposes, all waters on forest reservations, expressly provides that such waters may be used "under the laws of the United States and the rules and regulations established thereunder." The "laws of the United States" thus referred to and thereby (under the rule declared in *re Heath*, 144 U. S. 92) incorporated in this Act must be sections 2339 and 2340 of the United States Revised Statutes, the aforesaid Act of March 3, 1877, and the aforesaid Act of March 3, 1891, because these were the only general laws of the United States then in force relating to the appropriation of water and the appropriation and acquisition of rights of way for reservoirs and canals upon

the public domain, except an Act approved January 21, 1895 (28 U. S. Stat. at L. 635) which, by its terms, was limited to citizens engaged in the business of mining, quarrying or lumbering and to lands not within any park, forest, military or Indian reservation, and except an Act approved February 26, 1897, (29 U. S. Stat. at L. 599) which declares that reservoir sites reserved or to be reserved shall be open to use and occupation under said Act of March 3, 1891, and that any state may occupy such sites to the same extent as an individual or private corporation. This clause of the Act of June 4, 1897, construed as it must be in connection with "the laws of the United States" therein referred to, authorizes not only the appropriation of all non-navigable waters upon the forest reservations, but also the appropriation and use of all necessary rights of way for reservoirs and canals in accordance with the laws of the several states and the aforesaid laws of the United States then existing.

In passing, I desire to call the Court's attention to the fact that the term "milling" as used in the sentence quoted above from the Act of June 4, 1897, is undoubtedly the equivalent of the term "manufacturing" used in section 9 of the Act of July 26, 1866, and section 2339 of the United States Revised Statutes, which, as I have already shown, includes the generation or manufacture of electric power. That the terms "milling" and "manufacturing" are substantially equivalent and include the generation of electric power is supported by the following authorities:

- Lamborn v. Bell, 18 Colo. 346, 32 Pac. 989, 990-1;
- Denver Power and Irrigation Co. v. Denver & R. G. R. Co., 30 Colo. 204, 69 Pac. 568, 569;
- Lucas v. Ashland Light, M. & P. Co., 92 Neb. 550, 138 N. W. 761, 763.

The second section of the Act of Congress approved May 11, 1898, provides "that the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the pro-



visions of sections eighteen, nineteen, twenty and twenty-one of the Act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

By this section of the Act of May 11, 1898, Congress not only recognizes the existence of rights of way for reservoirs and canals acquired and to be acquired under the provisions of section 20 as well as under the provisions of section 18 of the Act of March 3, 1891, but also provides that rights of way granted under the provisions of sections 18, 19, 20 and 21 of the Act of March 3, 1891, "may be used for purposes of a public nature" without any qualification or limitation, and also for certain other purposes including "the development of power, as subsidiary to the main purpose of irrigation."

If, therefore, the generation of electric power for distribution and sale to the public is a public use so that rights of way and water rights used for that purpose are actually used for a purpose of a public nature, then section 2 of the Act of May 11, 1898, affords express authority for the use of rights of way for reservoirs and canals granted by the Act of March 3, 1891, for the generation of electric power for distribution and sale to the public. This is the purpose for which defendant is using the rights of way involved in this action.

That the generation of electric power for distribution and sale to the public is a public use is a proposition fully supported by the following cases:

*Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U. S., 30;

*Walker v. Shasta Power Company*, 160 Fed., 856.

If it is contended on behalf of the plaintiff that the reference in the second clause of section 2 of the Act of May 11, 1898, to the "development of power as subsidiary to the main purpose of irrigation" should be deemed to exclude the generation

of electric power from the purposes of a public nature mentioned in the first clause of this section, then the answer is that, while the use of rights of way for reservoirs and canals for the generation of electric power for distribution and sale to the public is a public use, the generation of electric power for the private or individual use of the owner thereof, whether for mining, manufacturing or other industrial purposes, is a private use; that the reference in this section to the "development of power as subsidiary to the main purpose of irrigation" contemplates the development of power for the private or individual use of the owner of the right of way as distinguished from the development of electric power for distribution and sale to the public; and that this construction gives full effect to both clauses of this section, while the plaintiff's construction makes the second clause destructive in part of the authority granted by the first clause.

The distinction here made between public and private uses of hydro-electric power plants and rights of way acquired for use in connection therewith has often been recognized in cases involving the appropriation, distribution and use of water. See:

*Hildreth v. Montecito Creek Water Co.*, 139 Cal., 22, 28-30;

*Thayer v. California D. Co.*, 164 Cal., 117, 125-131.

It should be noted that the term "right of way" as used in the aforesaid Acts of Congress and particularly as used in said Act of March 3, 1891, signifies, not merely an easement in the land surveyed, located and appropriated as a reservoir site or right of way for a ditch or canal, but rather the land itself appropriated for such purposes; and that the grant made by these Acts is really of a limited or determinable estate in fee, that is to say, an estate in fee to be held and owned by the grantee, its successors and assigns, so long as such land shall be used for the purpose for which it was granted, subject to the implied condition that the same shall revert to the United States if and whenever the grantee thereof shall

cease to use the same for that purpose. This interpretation of the term "right of way" as used in these Acts and of the grant made by said Acts is supported by the decisions of this Court in the following cases, which involve the interpretation of grants of rights of way to corporations for railroad purposes:

- Northern Pacific Ry. Co. v. Townsend, 190 U. S., 267;  
 New Mexico v. United States Trust Company, 172  
 U. S., 171;  
 Rio Grande Western Ry. Co. v. Stringham, 239 U. S. 44.

No condition precedent is attached to the grant of rights of way made by any of the aforesaid Acts except the condition prescribed by section 18 of the Act of March 3, 1891, "that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation." This condition has been correctly construed by the Secretary of the Interior, in the case of Rio Verde Canal Company, 27 L. D., 421, 423, as requiring that rights of way for reservoirs and canals granted by the Act of March 3, 1891, must be so located as not to interfere with the use of the reservations affected thereby for the purposes for which such reservations were created. The purposes for which forest reservations may be lawfully established are, as declared in the Act of June 4, 1897, to improve and protect the forest within the reservations, to secure favorable conditions of water flow and to furnish a continuous supply of timber for the citizens of the United States.

There is nothing in the record in this case that will support an inference that defendant's reservoir, pipe lines and water conduits have been located in such a way as to interfere with the proper occupation by the Government of the Fillmore National Forest; but, on the contrary, from the positive allegation contained in paragraph IV of plaintiff's complaint (transcript page 4) to the effect that defendant has been accorded the fullest opportunity to comply with the Acts of Congress and the regulations of the Secretary of Agriculture

and "thereby to obtain from the plaintiff permission to maintain and operate said power house, pipe lines or conduit, transmission lines, reservoir" and the buildings and structures composing its hydro-electric works, the absence of any allegation charging that defendant's reservoir, pipe lines and water conduits interfere with the proper occupation by the Government of said National Forest and the fact that plaintiff, in the prayer of its complaint (transcript page 6), instead of asking for an absolute injunction, prays that defendant "be enjoined from further operating said works without the permission of the plaintiff," it is to be inferred that defendant's reservoir and aqueducts have in fact been so located as not to interfere with the proper occupation by the Government of said National Forest.

To sum up this branch of the argument I submit that the following propositions have been fully established:

(a) Congress has by the Acts already mentioned, clearly and unequivocally granted to defendant, and to all others in like situation, as against the United States in its capacity as riparian proprietor, the right to appropriate and take the water of all non-navigable lakes, rivers and streams upon public lands and forest reservations of the United States for agricultural, mining, manufacturing, domestic, municipal and other beneficial uses including the generation of electric power; and

(b) Congress has also by said Acts granted to defendant, and to all others in like situation, the right to locate, appropriate and acquire rights of way for reservoirs, canals and ditches, through the public lands and reservations of the United States to be used for impounding, storing and conveying water for all beneficial uses including the generation of electric power, subject only to the condition provided for in said Act of March 3, 1891, that such rights of way shall be so located as not to interfere with the proper occupation by the Government of any such reservation.

## PROPOSITION NO. 2.

*Defendant's location and appropriation of the public or forest reserve lands involved in this suit, and its construction thereon of the reservoir, pipe lines and other water conduits mentioned in the complaint, and its subsequent use of such reservoir, pipe lines and water conduits for impounding, storing, and conveying the water of Beaver River to defendant's power house where it is used for the generation of electric power, constituted an acceptance of the grant offered by the aforesaid Acts of Congress, and resulted in vesting in defendant good title to the right of way or determinable fee granted by said Acts of Congress.*

As stated on page 11, *supra*, the language employed in sections 18 and 19 of the aforesaid Act of March 3, 1891, to grant rights of way for reservoirs and canals and to define the terms and conditions upon which such rights of way are granted, is substantially the same as the language employed in the Railroad Right of Way Act of March 3, 1875. Consequently, the decision of this Court in *Jamestown and Northern Railroad Company v. Jones*, there cited, wherein it is held that the grant made by said Railroad Right of Way Act may be accepted by actual construction of a railroad without filing, or obtaining the Secretary of the Interior's approval of, a map of location, is sufficient authority to support Proposition No. 2, if that proposition depended solely upon said Act of March 3, 1891.

This construction of the said Act of March 3, 1891, is also directly sustained by the decision of the Supreme Court of New Mexico, rendered August 10, 1910, in *United States v. Lee*, 15 N. M. 382, 110 Pac., 607, wherein it was held that the defendant, under the provisions of the Act of March 3, 1891, had the right to locate and construct, and thereby to acquire a right of way for, a canal over unsurveyed public lands of the United States to be used for the purpose of conveying water for irrigation, without filing a map of location and obtaining the approval thereof by the Secretary of the Interior

or obtaining a permit under the aforesaid Act of February 15, 1901.

Section 2 of the aforesaid Act of May 11, 1898, which expressly provides that rights of way for reservoirs and canals approved under the provisions of said Act of March 3, 1891, "may be used for purposes of a public nature," adds nothing to the requirements of said Act of March 3, 1891.

Sections 2339 and 2340 of the United States Revised Statutes and the Desert Land Act of March 3, 1877, do not, either expressly or by implication, require any person desiring to avail himself of the grant thereby made of the right to appropriate water from non-navigable streams on the public lands and rights of way for reservoirs and canals required to effect the appropriation of such water to file any application with any officer of the Government, or obtain any permit, patent or other evidence of such grant; but, on the contrary, under said Acts, water rights and rights of way for canals and reservoirs become vested and accrued by actual appropriation and use.

Lincoln County Water etc. Co. v. Big Sandy Reservoir Co., 32 L. D. 463;

Santa Fe Pac. R. R. Co., 29 L. D. 213.

The Act of June 4, 1897, after providing that "no public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of citizens of the United States," confers upon the Secretary of the Interior the authority to make provision for the protection of the forest reservations from fire and depredations and to make "such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."

But the Act of June 4, 1897, also provides that nothing therein contained shall "prohibit any person from entering

upon such forest reservations for all proper and lawful purposes," and that "all waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

The Act of June 4, 1897, does not, either expressly or by implication, repeal any part of any of the earlier Acts of Congress relating to water rights or rights of way for reservoirs and canals, but, on the contrary, in the clause last quoted, expressly authorizes the use of water on the forest reservations, "under" (*i. e.*, in accordance with) "the laws of the United States." That the "laws of the United States" thus referred to are the Acts of Congress hereinbefore considered, is clear, because said Acts of Congress are the only general laws of the United States that were then in existence relating to the appropriation of water on the public lands and reservations except the Acts of January 21, 1895, and February 26, 1897, mentioned on page 16, *supra*. That such a reference in one statute to other statutes incorporates in the former the provisions of the latter is well settled. See:

*In re Heath*, 144, U. S., 92;

Lewis' Sutherland on Statutory Construction, 2nd ed., sec. 405.

The Act of June 4, 1897, must, therefore, be so construed as to give full effect, not only to all of its own provisions, but also to all of the provisions of the aforesaid earlier Acts incorporated therein by reference, in accordance with the rules of construction declared by this Court in the case of

*Kohlsaat v. Murphy*, 96 U. S., 153;

as follows, viz:

"In the exposition of statutes, the established rule is that the intention of the law-maker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject, they are all to be taken



together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system. Resort may be had to every part of a statute, or, where there is more than one *in pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent."

It is settled by well considered decisions of this Court that the power granted to an executive officer of the Government to administer and execute an Act of Congress and to adopt regulations for the purpose of carrying the same into effect does not authorize him to make or enforce regulations inconsistent with such Act of Congress or destructive of any right thereby granted. See:

Morrill v. Jones, 106 U. S., 466;

United States v. Eaton, 144 U. S., 677, 687;

Williamson v. United States, 207 U. S., 425, 462.

Consequently the power granted to the Secretary of the Interior by the Act of June 4, 1897, to make and enforce regulations concerning the use and occupancy of forest reservations, does not authorize the adoption or enforcement of any regulation—

(a) Prohibiting any person from appropriating and using for any lawful purpose the water of non-navigable lakes and streams within any forest reservation;

(b) Prohibiting the location and construction of reservoirs or canals in any such reservation, provided they be so located as not to interfere with the purpose for which such reservation is created;

(c) Reserving to the Secretary of the Interior the right, in his discretion, to permit or to refuse to permit any person to survey, locate, appropriate and use such

reservoir and canal rights of way as may be either necessary or proper for the appropriation and use of water within any such forest reservation;

(d) Requiring any person desiring to avail himself of the grants made by the aforesaid Acts of Congress to file a map of location of the desired right of way and obtain the Secretary's approval thereof before constructing his proposed reservoir or canal; or

(e) Requiring any such person to enter into any stipulation or contract or to make any payment not required or authorized by said Acts.

Hence it follows that defendant, having actually appropriated and put to beneficial use of a public nature the waters of Beaver River, and having actually constructed and used, for the purpose of impounding, storing, and conveying such water, its reservoir, pipe lines and conduits, has acquired a right of way over, or determinable estate in fee in, the lands occupied by said reservoir and said pipe lines and conduits, unless the aforesaid Acts have been superseded or repealed by the aforesaid Act of February 15, 1901.

### PROPOSITION NO. 3.

*The Act of Congress entitled "An Act Relating to Rights of Way Through Certain Parks, Reservations, and Other Public Lands," approved February 15, 1901, (31 U. S. Stat. at L. 790) is not to be construed as substantive legislation superseding and by implication repealing the aforesaid Acts of Congress.*

The Act of February 15, 1901 (31 U. S. Stat. at L., 790), provides as follows:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations

of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: • • • *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

The authority to execute this Act of February 15, 1901, so far as it applies to forest reservations, was transferred from the Secretary of the Interior to the Secretary of Agriculture

by the first section of the aforesaid Act of February 1, 1905.

This Act of February 15, 1901, does not expressly repeal the whole or any part of any earlier Act of Congress.

The Act of February 15, 1901, embraces the entire subject matter of, and therefore plainly superseded and by implication repealed, the following Acts, except so far as the same relate to tramroads, viz:

1. The Act of January 21, 1895 (28 U. S. Stat. at L., 635—see Appendix, page 10), which authorizes the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, not within any park, forest, military, or Indian reservation, for tramroads, canals or reservoirs by any citizen or association of citizens engaged in the business of mining, quarrying, or cutting timber and manufacturing lumber;

2. The Act of May 14, 1896 (29 U. S. Stat. at L., 120—see Appendix, page 11), which expressly amends the aforesaid Act of January 21, 1895, by adding thereto a new section granting authority to the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way and necessary ground upon the public lands and forest reservations by any citizen or association of citizens for generating and distributing electric power; and

3. The first section of the Act of May 11, 1898 (30 U. S. Stat. at L., 404—see Appendix, page 17), which amends the aforesaid Act of January 21, 1895, by adding thereto a grant of authority to the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way upon the public lands, not within any park, forest, military, or Indian reservation, for tramways, canals, and reservoirs, by any citizen or association of citizens for the purpose of furnishing water for domestic, public, and other beneficial uses.

Consequently these three Acts need not be further considered, except incidentally and for the purpose of aiding in the construction and interpretation of the Act of February 15, 1901.

That the Act of February 15, 1901, was not inconsistent with, and did not supersede or repeal, the Act of March 3, 1891, and consequently that an individual had the right to construct, maintain and use canals, ditches and pipe lines upon and across public lands of the United States for the purpose of conveying water for irrigation, without first obtaining permission from the Secretary of the Interior, was directly decided in a well considered opinion by the Supreme Court of New Mexico in the case of

United States *v.* Lee, 15 N. M. 382, 110 Pac. 607.

That Congress did not intend that the Act of February 15, 1901, should operate to repeal the Act of March 3, 1891, is to be inferred from the fact that the operative language contained in the former Act is almost identical with the operative language contained in the first section of the Act of May 11, 1898, and the further fact that, by the second section of the Act of May 11, 1898, which declares that "rights of way for ditches, canals or reservoirs *heretofore or hereafter* approved under the provisions of sections eighteen, nineteen, twenty and twenty-one" of the Act of March 3, 1891, "may be used for purposes of a public nature," Congress then unmistakably evidenced its intention that the Act of March 3, 1891, should continue in force. That the first section of the Act of May 11, 1898, did not operate as a repeal *pro tanto* of the Act of March 3, 1891, was decided in the case of

United States *v.* Portneuf-Marsh Valley Irrigation Company, 205 Fed. 416;

Same case on appeal, 213 Fed. 601.

That the Secretary of the Interior, although he has erroneously construed the Act of March 3, 1891, as applying only to rights of way for reservoirs and canals to be used for the

purpose of irrigation, as I have already shown on pages 12 to 14 of this brief, has uniformly construed the Act of February 15, 1901, as not repealing sections 18 to 21 of the Act of March 3, 1891, is clearly shown by the regulations relating to rights of way over public lands and reservations which are to be found printed in

31 L. D. 13, see paragraph 1;

34 L. D. 212, 228, see paragraph 46;

36 L. D. 567, 568, 580, see paragraphs 1-4, 37;

41 L. D. 532, 533, see paragraphs 1, 2 and 3.

If the Act of February 15, 1901, does not operate to repeal the Act of March 3, 1891, there is no conceivable reason why it should be construed as repealing sections 2339 and 2340 of the United States Revised Statutes, the Act of March 3, 1877, or the Act of June 4, 1897, by which the United States, in its capacity as owner of public and reserved lands riparian to lakes, rivers and streams, has freely granted, as against itself and its successors in estate, the right to appropriate the waters of such lakes, rivers, and streams for beneficial uses, and without which the Acts of March 3, 1891, and February 15, 1901, would be applicable only in cases where the water to be impounded in reservoirs and conveyed in canals across public and reserved lands could be appropriated without violation of such riparian rights, if any, as are possessed by the United States. That Congress thought that these laws continued in force notwithstanding the Act of February 15, 1901, is fairly to be inferred from the provisions of section 8 of the Act of June 17, 1902, providing for Reclamation of Arid Lands. In support of this inference I refer to the able opinion written by Assistant Attorney-General Frank L. Campbell, September 5, 1903, approved by Secretary of the Interior E. A. Hitchcock and reported in 32 L. D. 254, wherein the conclusion is expressed that "those Acts" (*i. e.*, sections 2339 and 2340 of the United States Revised Statutes and the Act of March 3, 1877) "are still in full force and effect, and

their operation cannot be limited or suspended by executive authority."

The only judicial decision that I have been able to find supporting, even by inference, the conclusion that the Act of February 15, 1901, operates as a repeal of the aforesaid earlier Acts is the decision by the Circuit Court of Appeals for the Eighth Circuit in the case of

United States *v.* Utah Power and Light Company, 209  
Fed. 554,

wherein it was held that the aforesaid Act of May 14, 1896, withdrew "from the operation of that section" (*i. e.*, section 2339 of the United States Revised Statutes) "the subject of generating, manufacturing, or distributing electric power, the manner of acquiring rights of way over the public lands for those purposes, and the nature and extent of such rights" (p. 561). This decision, so far as it relates to this point, is supported by reasoning neither cogent nor convincing and by no authority save the Government's brief; and its unsoundness is evident from the fact that the Act of May 14, 1896, does not, either expressly or by implication, in the provisions conferring authority upon the Secretary of the Interior, refer to rights of way for reservoirs, canals or ditches. Rights of way for reservoirs, canals and ditches to be used for impounding, storing, conveying and distributing water for every beneficial use, including, as was held by the Circuit Court of Appeals in this very case, the generation or manufacture of electric power, had already been granted by section 2339 of the United States Revised Statutes and the aforesaid Act of March 3, 1891. But, until the adoption of this Act of May 14, 1896, Congress had not granted or authorized the grant of rights of way for electric transmission lines or the use of lands required for the construction of electric generating plants. This Act of May 14, 1896, should, therefore, plainly have been construed as granting authority to issue permits for the construction of electric generating plants and electric transmission lines and as having no reference whatsoever to rights of



way for reservoirs or canals used in storing water and conveying the same to electric generating plants.

In this connection it should be noted that the Act of February 15, 1901, whatever may be its true construction, applies expressly and in plain terms equally to all reservoirs and to all kinds of aqueducts, whether used to promote irrigation or or mining, or the supplying of water for domestic, public, or any other beneficial use; and consequently that, if this Act superseded and repealed by implication section 2339 of the United States Revised Statutes in its application to rights of way used to promote the utilization of water for the generation of electric power, then, by parity of reasoning, it is indubitable that it also superseded and repealed by implication said section 9 of the Act of July 26, 1866, sections 2339 and 2340 of the United States Revised Statutes, and also sections 18 to 21 of the Act of March 3, 1891, as amended by section 2 of the Act of May 11, 1898, in their application to rights of way used to promote irrigation, mining, domestic, public, or any other beneficial use, that is to say, in their entirety.

But, as the decree of the District Court in the case at bar cannot otherwise be sustained, I assume that it will be contended in this Court on plaintiff's behalf that the Act of February 15, 1901, is to be construed as substantive legislation superseding and by implication repealing the aforesaid earlier Acts of Congress and granting to the Secretary of the Interior full power and authority to grant or refuse to grant, in his uncontrolled discretion, in accordance with his conception of what is required by the public interest, and upon such terms and conditions as he may prescribe by general regulations, permits to locate and use rights of way for reservoirs and canals for storing and conveying water for any or all of the purposes therein specified and also rights of way for plants for the generation and transmission of electric power.

If the Act of February 15, 1901, is to be construed as repealing by implication the earlier legislation whereby Con-

gress has itself established all needful rules and regulations respecting the appropriation of water and the appropriation and acquisition of rights of way for reservoirs and canals upon the public lands and reservations of the United States and further as delegating to the Secretary of the Interior the power to prescribe by general regulations the terms and conditions upon which citizens, voluntary associations and corporations may appropriate water and acquire rights of way for reservoirs and canals upon the public lands and reservations of the United States in aid of irrigation, mining, domestic, public, or any other beneficial use, and further as conferring upon the Secretary of the Interior discretionary power, in accordance with his conception of what is or is not compatible with the public interest, to grant or to refuse to grant to any citizen or association of citizens or corporation a permit or license to use, upon the terms and conditions so prescribed by him, a right of way for any such purpose, and also power in his discretion to revoke any permit theretofore granted by him and terminate the rights initiated, possessed and exercised thereunder, then, as I shall presently show, this Act is repugnant to the Constitution and void as an attempted delegation by Congress to an executive officer of a part of the legislative power which the Constitution has conferred upon Congress alone.

But, if the Act of February 15, 1901, is susceptible of a construction which, instead of making it operate as a repeal by implication of the earlier Acts of Congress relating to the same general subject, will harmonize it with such earlier Acts and render unnecessary a consideration and decision of the question of its constitutionality, such construction is required by the following rules, viz:

1. In the exposition of several statutes relating to the same subject, the intention of the lawmaker is to be deduced from a view of all of the statutes taken together, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object. This rule is supported by the decision of this Court in

*Kohlsaatt v. Murphy*, 96 U. S. 153.

2. Repeals by implication are not favored and if, by any reasonable construction, two or more statutes, *in pari materia*, enacted at different dates can be harmonized so as to stand together, the construction which will accomplish that result should be adopted. This rule is supported by the decisions of this Court in

Wilmot *v.* Mudge, 103 U. S. 217, 221;

Cope *v.* Cope, 137 U. S. 682, 686.

3. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." This rule is supported by the decision of this Court in

United States *v.* Delaware and Hudson Company, 213 U. S. 366, 407-8.

Furthermore it is well settled that, as declared by this Court in *Town of Red Rock v. Henry*, 106 U. S. 596, 601-2:

"When an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two Acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the Legislature to repeal must be clear and manifest."

To determine whether said Act of February 15, 1901, repeals by implication, or may be so construed as to harmonize with, the aforesaid earlier Acts of Congress, it is necessary to analyze and compare their respective provisions.

The essential features of the aforesaid earlier Acts are:

(a) A free grant, as against the United States in its capacity as owner of riparian lands, of the right to appropriate, for any and every lawful beneficial use, the waters of lakes, rivers and streams on public lands and forest and other reservations;

(b) A free grant of all rights of way for reservoirs and canals reasonably required for the appropriation, storage, conveyance and use of such waters; and

(c) As an incident to the grant of rights of way, a free grant of the right to enter upon public and reservation lands, and to survey, locate and appropriate such rights of way, subject only to the condition that, if the desired rights of way are within any reservation, they must be so located as not to interfere with the proper occupation of such reservation by the government.

The Act of February 15, 1901, does not cover these essential features of the earlier Acts because it does not expressly—

(a) Grant to any person or corporation the right to appropriate the water of any lake, river, or stream upon any public land or reservation of the United States;

(b) Deny to any person or corporation the right to appropriate the water of any lake, river or stream upon any public land or reservation of the United States;

(c) Grant to any person or corporation any right of way for a reservoir, canal or other aqueduct;

(d) Deny to any person or corporation the right to locate and appropriate any right of way for a reservoir, canal or other aqueduct;

(e) Grant to any person or corporation the right to enter upon any public land or reservation for the purpose of surveying, locating or appropriating a right of way for any reservoir, canal or other aqueduct; or

(f) Deny to any person or corporation the right to enter upon any public land or reservation for the purpose of surveying, locating or appropriating a right of way for any reservoir, canal or other aqueduct.

On the contrary, the Act of February 15, 1901, by expressly authorizing the Secretary of the Interior, "*under general regulations to be fixed by him, to permit the use of rights of*

way through the public lands, forest and other reservations", for the purposes therein specified, assumes by necessary implication the continued existence of the following rights recognized or granted by the aforesaid earlier Acts of Congress, viz:

(a) The right to appropriate, for every beneficial use, the water of lakes, rivers and streams on the public lands and reservations of the United States;

(b) The right to construct and maintain, on such lands and reservations, reservoirs, canals and other aqueducts as means to the appropriation and use of water;

(c) The right to locate, appropriate and possess, on such lands and reservations, all necessary rights of way for such reservoirs, canals and aqueducts; and

(d) The right to use such rights of way for reservoirs and aqueducts for impounding, storing, conveying and distributing water for all lawful beneficial uses.

The Act of February 15, 1901, does not expressly declare whether or not the "general regulations to be fixed by" the Secretary of the Interior shall be consistent with the provisions of the aforesaid earlier Acts of Congress relating to the appropriation of water and making grants of rights of way for reservoirs and canals, and, therefore, as a consequence of the implied limitation upon the authority of executive officers declared by this Court in *Morrill v. Jones* and other cases cited on page 24 of this brief, should be deemed to authorize the Secretary of the Interior to make only such general regulations as shall be consistent with such earlier Acts.

The Act of February 15, 1901, does not expressly declare or define "*the public interest*" (which is plainly the equivalent of "public policy"), incompatibility with which is the only ground expressly mentioned therein for not allowing "permits" "within or through any of said parks or any forest, military, Indian or other reservation", and, consequently, should be construed as requiring the Secretary of

the Interior to ascertain or determine in every case what constitutes "public interest" or "public policy" by resorting, as courts of justice do, to the Constitution, to the statutes, and to judicial decisions declaring and interpreting the law of the land.

As pointed out in the ~~last~~ <sup>middle</sup> paragraph on page 19 of this brief, the only condition attached by any Act of Congress, prior to February 15, 1901, to the free grant of rights of way for reservoirs and canals thereby made is the condition specified in section 18 of said Act of March 3, 1891, namely, "that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

It follows, I submit, that the Act of February 15, 1901, if it be construed in connection with the earlier Acts of Congress relating to the same subject, does not confer upon the Secretary of the Interior discretionary authority to refuse to permit any citizen, association or corporation of the United States to acquire or use any right of way for a reservoir or canal upon public lands or within any forest or other reservation of the United States except when, upon investigation, it is ascertained that such right of way has been so located as to interfere with the proper occupation by the Government of such forest or other reservation for the purposes for which the same was created. For, otherwise, the grant of authority made by the Act of February 15, 1901, "to permit the use of rights of way through the public lands, forest and other reservations of the United States" (such rights of way being granted by, and capable of being acquired under, the aforesaid earlier Acts of Congress and not otherwise), would be a grant of discretionary authority to the Secretary of the Interior to make inoperative said earlier Acts and to deny to

any citizen, association or corporation the rights thereby granted; and this would involve the absurdity of holding (if I may paraphrase the language used in the opinion of this Court in *Daniels v. Wagner*, 237 U. S. 547, 557-9) that, although Congress possesses, and by the enactment of its aforesaid earlier Acts has actually exercised, the power to provide for the disposition or granting of rights of way over the public lands and reservations of the United States and to fix the terms and conditions upon which the people may enjoy the right to acquire such rights of way, nevertheless "it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law" (*i. e.*, the Act of February 15, 1901) "in the administrative officers appointed for the purpose of giving effect to the law".

The operative language of the Act of February 15, 1901, viz, the entire first clause thereof, construed literally, merely confers upon the Secretary of the Interior authority "to permit", *i. e.*, to allow, either tacitly or expressly, "the use of rights of way through the public lands, forest and other reservations of the United States," for certain designated purposes, is not expressly limited in its operation either to rights of way existing at the date of the Act or to rights of way thereafter to be acquired and is silent upon the subject of their acquisition. But rights of way over the public lands, forest and other reservations, whether acquired before or after the enactment of the Act of February 15, 1901, constitute property, the owners of which are entitled to the protection of the Constitution; and therefore Congress does not possess, and consequently cannot confer upon the Secretary of the Interior, the power to take any such right of way, except for public use and upon making just compensation therefor, or the power to prohibit or prevent any citizen, association or corporation from possessing, or using for any



lawful purpose, any such right of way. It follows necessarily that the Act of February 15, 1901, if construed literally and without reference to other legislation upon the same subject, is without meaning, force or effect; and consequently, under accepted rules of construction, it is necessary to endeavor to ascertain the intent of Congress by considering the language of this Act as a whole in connection with the other Acts of Congress relating to the same subject matter existing at the date of its enactment.

In any attempt to construe the Act of February 15, 1901, in connection with the aforesaid earlier Acts of Congress, two questions naturally arise, viz:

1. What is the purpose of this Act? and
2. What is the legal nature and effect of the permits to be issued pursuant to its provisions and the general regulations to be adopted thereunder?

The Act of February 15, 1901, does not contain an express and explicit answer to either of these questions, but rather leaves its purpose and the nature and effect of the permits whose issuance is thereby authorized to be inferred by processes of legal reasoning based upon a consideration of general principles of law recognized and enforced by the Courts of the United States.

In endeavoring to ascertain the purpose of the Act of February 15, 1901, and the legal nature and effect of the permits to be issued thereunder, one should bear constantly in mind the following considerations:

- (a) The right to appropriate for beneficial uses the waters of lakes, rivers and streams on the public lands and reservations of the United States was, in February, 1901, and is now (either by virtue of the political sovereignty and authority possessed by each state of the Union or by virtue of grants made by the United States, in its capacity as proprietor of public lands and reservations riparian to such sources of water supply, by sections

2339 and 2340 of the United States Revised Statutes, the Act of March 3, 1877, and the Act of June 4, 1897) governed, regulated and controlled by state law.

Gutierrez et al. v. Albuquerque Land and Irrigation Co., 188 U. S. 545, 552-5;

Kansas v. Colorado, 206 U. S. 46, 85-95.

(b) Under the laws of all of the western states, the right to appropriate water becomes a vested and accrued right only by construction of the necessary works and actual use of the water appropriated.

Black's Pomeroy on Water Rights, sections 49, 50, 51 and 54;

Farnham on Waters and Water Rights, sections 662, 666, 668;

Maeris v. Bicknell, 7 Cal. 261;

Kimball v. Gearhart, 12 Cal. 27, 49.

(c) Under state laws, whether operating *ex proprio vigore* or by virtue of the consent of Congress evidenced by the Acts of Congress mentioned in (a) *supra* and section 18 of the Act of March 3, 1891, as well as under section 8 of the Reclamation Act of June 17, 1902 (32 U. S. Stat. at L. 388), beneficial use is the basis, the measure and the limit of the right to water which may be acquired by appropriation.

Black's Pomeroy on Water Rights, section 85;

Atchison v. Peterson, 20 Wall. 507;

Riverside Water Co. v. Sargent, 112 Cal. 230, 234.

(d) By none of the general Acts of Congress in force in 1901 relating to the same subject matter, *i. e.*, Sections 2339 and 2340 of the United States Revised Statutes, the Act of March 3, 1877, the Act of March 3, 1891, the Act of June 4, 1897, and the second section of the Act of May 11, 1898, was there expressly conferred upon the Secretary of the Interior any authority to adopt and enforce

regulations providing for the administration and execution of such acts, except the authority conferred by said Act of June 4, 1897, to make rules and regulations concerning the occupancy and use of forest reservations designed to insure the objects for which such reservations were created, namely the preservation of the forests from destruction and securing favorable conditions of water flow, or any authority to supervise or control the location of rights of way for reservoirs and canals, except such authority as was granted by implication by the last clause of section 18 of the Act of March 3, 1891, which declares that no "right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation."

(e) In none of the general Acts of Congress in force in 1901 relating to this subject, except said Act of March 3, 1891, was there any provision for making a record of any right of way for a reservoir or canal located upon public lands or reservations of the United States; and the Act of March 3, 1891, did not authorize the approval of maps of rights of way located on unsurveyed lands. See:

Santa Fe Pacific R. R. Co., 29 L. D. 213;

Lincoln County Water Supply<sup>v</sup> and Land Co. v. Big Sandy Reservoir Co., 32 L. D. 463.

(f) Under the provisions of section 19 of the Act of March 3, 1891, approval by the Secretary of the Interior of a map showing the location of a reservoir or canal upon surveyed lands operated to vest title in the locator to the easement or determinable fee granted by that Act, subject to forfeiture if he failed to complete the construction of his reservoir or canal within five years; but such forfeiture could be accomplished only by a legislative act or by judicial proceedings. See:

- Noble v. Union River Logging R. R. Co.*, 147 U. S. 165, 172-6;  
*Bybee v. Oregon and California R. R. Co.*, 139 U. S. 663;  
*Schulenberg v. Harriman*, 21 Wall. 44;  
*Utah N. & C. R. Co. v. Utah & C. Ry. Co.*, 110 Fed. 879, 890;  
*Allen et al. v. Denver Power and Irrigation Co.*, 38 L. D. 207, 211.

(g) The Secretary of the Interior had, by an almost uniform line of decisions, refused, however erroneously, to accept and approve maps filed pursuant to the provisions of section 19 of the Act of March 3, 1891, and the amendment thereof contained in section 2 of the Act of May 11, 1898, unless the applicant certified that the right of way delineated upon such map was desired either exclusively for irrigation or for the main purpose of irrigation. See:

- South Platte Canal and Reservoir Co.*, 20 L. D. 154;  
*Town of Delta*, 32 L. D. 461;  
 Regulations, paragraph 23, 34 L. D. 212, 221-2;  
 Regulations, paragraph 21, 36 L. D. 567, 574.

(h) Under the special Acts of January 21, 1895, May 14, 1896, and the first section of the Act of May 11, 1898, referred to on page 27 of this brief, which authorized the Secretary of the Interior to "permit the use of right of way" under general regulations to be fixed by him, the Secretary of the Interior had adopted regulations providing that any applicant for a permit might file a map and field notes showing the location of the desired right of way accompanied by evidence showing that the applicant was entitled to avail himself of the privileges granted by the Act, and that the Secretary of the Interior, if the application were found satisfactory, would issue the desired permit and thereupon send a copy of the original

map to the local officers who were directed to mark the line of the right of way upon the township plats and note opposite each tract of public land affected that such permit had been issued. These regulations are printed in 20 L. D. 165, 23 L. D. 519 and 27 L. D. 495. In section 9 of the regulations printed in 20 L.D. and section 10 of the regulations printed in 23 L. D. and 27 L. D. it is stated that permission may be given under these Acts for rights of way on unsurveyed land.

Such being the condition of the law when the Act of February 15, 1901, was adopted, the most reasonable and natural inference to be made from its provisions is that the purposes sought to be accomplished by its enactment were as follows:

(a) To enlarge and extend the right granted by the Act of June 4, 1897, to the Secretary of the Interior to make regulations designed to aid in the administration and execution of that Act, by authorizing him to adopt and enforce general regulations designed to aid in the administration and execution of all Acts of Congress granting, and authorizing the use of, rights of way for reservoirs, canals, plants for the generation and distribution of electric power, and telegraph and telephone systems, whether on public lands, forest or other reservations of the United States;

(b) To enable the Secretary of the Interior, under general regulations, to permit any person desirous of acquiring a right of way for the purposes therein specified, whether on surveyed or unsurveyed public lands and reservations, to file in the land office maps and field notes showing the location thereof prior to construction;

(c) To enable the Secretary of the Interior to provide for making a record in the United States Land Office of rights of way located on public lands, forest or other reservations, whether surveyed or unsurveyed; and

(d) To enable the Secretary of the Interior to estab-

lish a procedure whereby any person desirous of obtaining a right of way for a reservoir or canal or other authorized work may obtain a determination, in advance of construction, whether his proposed right of way, if located within the boundaries of a forest or other reservation, is so located as not to interfere with the proper occupation of such reservation by the Government, if the lands upon which such right of way is located are unsurveyed or if it is impracticable or inconvenient for any other reason to comply fully with the provisions of section 19 of the Act of March 3, 1891.

In endeavoring to ascertain the legal nature and effect of the permits the issuance of which is authorized by the Act of February 15, 1901, one should take into consideration the following propositions, which, I submit, can hardly be deemed disputable, viz:

(a) That nothing in the Act of February 15, 1901, negatives or denies the right which, as I have already shown on pages 21 to 25 of this brief, existed under earlier Acts of Congress to locate definitely, and acquire title to, rights of way for reservoirs or canals by actual construction of such reservoirs or canals;

(b) That there is no necessary inconsistency between the provisions of section 19 of the Act of March 3, 1891, under which maps of location may be filed with and approved by the Secretary of the Interior when the proposed right of way is located upon surveyed public lands within or without a reservation and the provisions of the Act of February 15, 1901, under which the Secretary of the Interior is authorized to issue permits for the location and use of rights of way for reservoirs and canals on public lands and reservations, whether surveyed or unsurveyed and whether the applicant finds it impracticable, or for any reason does not desire, to fully comply with the requirements of section 19 of said Act of March 3, 1891; and, consequently,

(c) That said act of February 15, 1901, does not indicate an intention on the part of Congress either to make the obtaining of a permit under its provisions a condition precedent to the appropriation and acquisition of rights of way for reservoirs and canals by any person who fully complies with all of the requirements and conditions of the aforesaid earlier Acts of Congress or to prohibit any person who has obtained a permit pursuant to its provisions from subsequently complying with all of the provisions of said earlier Acts and thereby acquiring all and singular the rights thereby granted.

It follows: (1) that the permit, which the Act of February 15, 1901, authorizes to be issued and expressly declares to be revocable by the Secretary of the Interior in his discretion, is designed to protect the permittee, during the preliminary stages of his enterprise, by making a public record and giving public notice of his proposed appropriation of right of way, and involves an official determination that such right of way has been properly located; and (2) that such permit, although revocable at any time without judicial proceedings in the event of the permittee's failing or neglecting to commence and prosecute to completion within a reasonable time the construction of the works contemplated by his permit, becomes *functus officio* when the permittee, by his compliance with the aforesaid earlier Acts of Congress and the construction of his proposed reservoir, canal, plant for the generation and distribution of electric power, or telephone and telegraph system, becomes entitled to claim and assert ownership of vested and accrued rights of way for the maintenance and operation of the works constructed by him.

The conclusion from the foregoing consideration is that the true intent and meaning of the Act of February 15, 1901, is simply to grant to the Secretary of the Interior authority:

(1) To adopt and enforce general regulations consistent with, and designed to aid in administering and carrying into effect, the laws of the United States relating



to rights of way, for the purposes therein specified, over the public lands, forest and other reservations of the United States; and

(2) Under and pursuant to such regulations, upon application therefor being made, and upon a determination that the applicant has properly located a right of way for his proposed works and is a citizen, association or corporation of the United States, to issue a permit under which the applicant may safely proceed to construct and use a reservoir, canal, plant for the generation and distribution of electric power or telephone and telegraph system, and thereby acquire a vested right of way under and by virtue of the aforesaid earlier Acts of Congress.

So construed, the Act of February 15, 1901, is in no respect inconsistent, or in conflict, with the aforesaid earlier Acts of Congress.

Furthermore, if the Act of February 15, 1901, stood alone, and if no aid in its interpretation and construction were afforded by the aforesaid earlier Acts of Congress, I submit that, under general principles of law recognized and declared in recent decisions of this Court, it should be held that, when any citizen, association or corporation enters upon public lands, forest or other reservations of the United States under the authority of a permit issued pursuant to the provisions of said Act of February 15, 1901, and at great expense constructs reservoirs, canals, plants for the generation and distribution of electric power, telephone and telegraph systems, whether devoted to public or private uses, such citizen, association or corporation acquires a vested interest in the right of way appropriated and occupied, and that the permit originally revocable at will becomes irrevocable. Such a conclusion seems absolutely necessary when the right of way and works constructed thereon are devoted to public use, because in every such case, as a matter of practical necessity

and also as a matter of legal obligation enforced through the agency of public utility commissions and courts of justice, the owner of property devoted to the service of the public, whether for supplying water, light, power or telegraph or telephone service, is not at liberty to suspend or abandon the service of the public by means of such property so long as communities requiring such service exist and are ready, able and willing to receive, and to pay adequate compensation for, the same, and because the occupation and use of rights of way upon the public lands and forest reservations and the construction and operation thereon of public utility plants of the kinds therein specified naturally result in building up communities dependent, for their comfort, prosperity and even existence, upon the service rendered by means of such plants, and because the possession and exercise by an executive officer of the United States of the right and power to revoke, in his discretion, the permits issued by him or his predecessor in office and thereby to terminate the right of occupancy and use of such right of way, after the construction of such plants, would deprive the owner of the public utility of the power to discharge his duty to the public and either deprive the public of its accustomed service or compel the public to obtain the necessary authority and to serve its own uses by means of public ownership and operation of such utility.

The general principles of law to which reference is made at the beginning of the last paragraph, and the decisions of this Court recognizing and applying the same, are as follows:

1. Where a grant of rights of way, franchises or other rights and privileges is made by a general law designed to further public objects, to promote the general welfare, or to aid in the general development of the country by inducing individuals or corporations to undertake and accomplish great and expensive enterprises or works of a public or quasi-public character, such general law, instead of being construed strictly in favor of the Government and against the grantee, should be given "a prac-

tical, common-sense construction" in order that its objects may be accomplished.

Russell v. Sebastian, 233 U. S. 195, 205-210;

United States v. Denver and Rio Grande R. Co., 150 U. S. 1, 8-15.

2. Whenever, by or under authority of a constitution or a general law enacted by the legislature, authority or consent is given by government to any individual or corporation to exercise a franchise or public easement or similar right, as a means of inducing, or in contemplation of, the investment of a large amount of capital in the construction of works of a permanent nature to be used in permanent service of the public, such authority or consent should be deemed to be, not a grant of a mere revocable license, but rather a grant of a franchise, easement or right in perpetuity, unless a shorter time is clearly specified.

Boise Artesian H. & C. Water Co. v. Boise City, 230 U. S. 84, 87-92;

Russell v. Sebastian, 233 U. S. 195, 202-4;

New York Electric Lines Co. v. Empire City Subway Co., 235 U. S. 179, 185-193;

Owensboro v. Cumberland Telephone and Telegraph Co., 230 U. S. 58, 64-66.

3. A grant of a franchise, public easement or other right, whether granted in perpetuity or for a limited term, is subject, of course, to revocation or forfeiture when the grantee fails to comply with the conditions of the grant or to render the public service constituting the consideration therefor.

New York Electric Lines Co. v. Empire City Subway Co., 235 U. S. 179, 194-196.

4. But, when a person has accepted a grant of a franchise, public easement or other right, has proceeded with

reasonable diligence and in good faith to comply with the terms of the grant, has at large expense constructed the necessary works, and is rendering the public service which constitutes the real consideration for the grant, he has acquired vested and accrued property rights of which he may not be deprived arbitrarily or without due process of law, even though the law, or ordinance by which the grant was made is expressly declared to be subject to be altered, amended or repealed.

*Owensboro v. Cumberland Telephone and Telegraph Co.*, 230 U. S. 58, 71-75;

*Chicago, Milwaukee and St. Paul Railroad Co. v. Wisconsin*, 238 U. S. 491, 501-2.

5. Even a license, although originally a mere personal, revocable and non-assignable privilege, becomes irrevocable, when the licensee, with the acquiescence of the licensor, and acting under the authority given by the license, erects upon the licensor's lands, at his own expense, works or structures of a permanent character, the construction of which was contemplated by the licensor when the license was given.

*Owensboro v. Cumberland Telephone and Telegraph Company*, 230 U. S. 58, 64.

On this point see also:

*Greenwood Lake and Port Jervis R. R. Co. v. New York and Greenwood Lake R. R. Co.*, 134 N. Y. 435, 440;

*Trustees of Southampton v. Jessup*, 162 N. Y. 122, 126;

*Stoner v. Zucker*, 148 Cal. 516;

*Plimmer v. Wellington*, L. R. 9 App. Cas. 699.

The Act of February 15, 1901, considered by itself alone, should be deemed a grant of authority to the Secretary of the Interior to issue, in conformity with general regulations to be adopted by him, permits giving leave or license to the permittees, not merely to use rights of way, but to enter upon public lands, forest and other reservations of the United States and there to construct canals, reservoirs, works for generating and lines for transmitting electric power, and telephone and telegraph lines, all of which are works of a permanent character involving the expenditure or investment of large amounts of capital and designed to promote the general welfare and to aid in the development of the resources and industries of the country. Permits issued pursuant to the authority conferred by this Act would, under the five general principles of law which I have just stated and the authorities cited in support thereof, be deemed to operate, not as mere revocable licenses, but rather as grants of easements or rights of way in perpetuity, if it were not for the proviso at the end of the statute "that any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation or park"; and this proviso may well be deemed to be simply a declaration of intention on the part of Congress that no permit issued by the Secretary of the Interior under the authority of this act shall, of itself and prior to the construction of the contemplated works, confer anything more than a license revocable by the Secretary of the Interior without legislative action or judicial proceedings, and not a declaration of intention that any permittee, who, pursuant to the authority given to him, shall have constructed permanent works at large expense, shall thereafter hold such works and the rights of way whereon they are constructed at the will of the Secretary of the Interior. For it is apparent that the principal purpose of this act is to authorize the granting of permission to use rights of way

as a means of inducing the investment of capital in the construction of works of a permanent nature to be used largely in permanent service of the public; and a construction of the final proviso in this Act as a reservation of the right to revoke licenses or permits issued under its provisions after the construction of the contemplated works would inevitably defeat its principal purpose, as no prudent person would risk the investment of his capital upon such terms. This would be directly in conflict with the settled rule of construction that a statute must be construed, if possible, so as to effectuate the evident object of the legislature in its enactment, and "so as to avoid an unjust or an absurd conclusion," even if, in order to do so, it is necessary to limit the application of general terms and to indulge the presumption "that the legislature intended exceptions to its language, which would avoid results of this character."

Hawaii v. Mankichi, 190 U. S. 197, 212-218;  
Bernier v. Bernier, 147 U. S. 242, 246.

For the purpose of illustrating, and indicating the scope of, the rule of construction which I have just stated I quote the following from the opinion of this Court in Hawaii v. Mankichi, *supra*:

"But there is another question underlying this and all other rules for the interpretation of statutes, and that is, What was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute; or, as tersely expressed by Mr. Justice Swayne, in *Smythe v. Fiske*, 23 Wall. 374, 380, 23 L. ed. 47, 49: 'A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law.' A parallel expression is found in the opinion of Mr. Chief Justice

Thompson of the supreme court of the state of New York (subsequently Mr. Justice Thompson of this Court), in *People v. Utica Ins. Co.* 15 Johns. 358, 381, 8 Am. Dec. 243: 'A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.'

"Without going farther, numerous illustrations of this maxim are found in the reports of our own court. Nowhere is the doctrine more broadly stated than in *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278, in which an act of Congress, providing that if 'any person shall knowingly and wilfully obstruct or retard the passage of the mail, or any driver or carrier,' was held not to apply to a state officer who held a warrant of arrest against a carrier for murder, the court observing that no officer of the United States was placed by his position above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of felony. 'All laws,' said the court, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' A case was cited from Plowden, holding that a statute which punished a prisoner as a felon who broke prison did not extend to a prisoner who broke out when the prison was on fire, 'for he is not to be hanged because he would not stay to be burned.' Similar language to that in *Kirby's Case* was used in *Carlisle v. United States*, 16 Wall. 147, 153, 21 L. ed. 426, 429.

"In *Atkins v. Fibre Disintegrating Co.* 18 Wall. 272, 21 L. ed. 841, it was held that a suit *in personam* in



admiralty was not a 'civil suit' within the 11th section of the judiciary act, though clearly a civil suit in the general sense of that phrase, and as used in other sections of the same act. See also *Re Louisville Underwriters*, 134 U. S. 488, 33 L. ed. 991, 10 Sup. Ct. Rep. 587. So in *Heydenfeldt v. Daney Gold & Silver Min. Co.* 93 U. S. 634, 638, 23 L. ed. 995, 996, it was said by Mr. Justice Davis: 'If a literal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment.' To the same effect are the *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, in which many cases are cited and reviewed, and *Lau Ow Bew v. United States*, 144 U. S. 47, 59, 36 L. ed. 340, 345, 12 Sup. Ct. Rep. 517. In this latter case it was held that a statute requiring the permission of the Chinese government, and the identification of 'every Chinese person other than a laborer, who may be entitled by said treaty or this act (of Congress) to come within the United States,' did not apply to 'Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to re-enter it on their return to their business and their homes.' Said the Chief Justice: 'Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.'

"Two recent English cases are instructive in this connection: In *Plumstead Dist. Bd. of Works v. Spackman*, L. R. 13 Q. B. Div. 878, 887, it was said by the Master

of Rolls, afterwards Lord Esher: 'If there are no means of avoiding such an interpretation of the statute' (as will amount to a great hardship), 'a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but, to my mind, a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended.' See also *Ex parte Walton*, L. R. 17 Ch. Div. 746."

Plainly there is as much reason for holding that the declaration at the end of the Act of February 15, 1901, that the Secretary of the Interior may, in his discretion, revoke any permission given by him or his successor, does not authorize him to forfeit or in any manner recover possession of a right of way upon which permanent works have been constructed or to take, destroy or compel the removal of permanent works constructed pursuant to such permission, as there was for holding, as this Court did in *Owensboro v. Cumberland Telephone and Telegraph Company*, *supra*, that the charter power of a municipality to amend and repeal its ordinances did not include the right to forfeit or terminate a franchise or public easement granted by an ordinance under which a telephone system had been constructed and was being operated.

Plainly also the declaration at the end of the Act of February 15, 1901, that "any permission given by the Secretary of the Interior under the provisions of this Act \* \* \* shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park" does no more than to make clear the intent of Congress that the permits to be issued under the authority of this Act are to be deemed licenses rather than grants of easements;—this declaration does not go so far as to say that the general principles of law

and equity, under which even parol licenses granted without pecuniary consideration become irrevocable when the licensee, with the acquiescence of the licensor and acting under the authority given by the license, erects, at his own expense, upon the licensor's land, works or structures of a public character the construction of which was contemplated by the licensor when the license was given, shall not apply and protect the permittees from arbitrary forfeiture or spoliation of such works and structures and the rights of way whereon they have been constructed.

That the doctrine of estoppel, which prevents a licensor from revoking his license when such action on his part would be inequitable and manifestly contrary to justice, applies to the Government of the United States as well as to private persons is established by the following authorities:

(1) *United States v. Stinson*, 125 Fed. 907, 910; wherein it is said by the Circuit Court of Appeals of the Seventh Circuit that "the substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals."

(2) *United States v. Stinson*, 197 U. S. 200; wherein this Court affirmed the decision reported in 125 Fed. 907, and in its opinion recognized and applied the principle declared by the Circuit Court of Appeals.

(3) *Walker v. United States*, 139 Fed. 409, 413; affirmed in 148 Fed. 1022; wherein the Circuit Court, in an opinion affirmed by the Circuit Court of Appeals of the Fifth Circuit, says:

"The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the Government."

(4) *Iowa v. Carr*, 191 Fed. 257, 266-270; wherein the Cir-

cuit Court of Appeals of the Eighth Circuit held, (I quote from the 9th paragraph of the syllabus);

"In a controversy between the rights of a state or nation and those of a citizen, while the state or nation is not barred by mere delay, its rights are measured and adjudicated by the doctrine of estoppel and the other principles and rules of law and equity applicable to the like rights of a citizen under similar circumstances."

(5) *Brent v. Bank of Washington*, 10 Peters 596, 614; wherein this Court says:

"Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking, in the administration of the law of equity, relief; to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in *The United States v. Mitchell* (9 Peters, 743), have recognized the principle in the common law that though the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. (2 Co. Inst., 573; 2 Ves., Sen., 296, 297; Hard., 60, 460.) This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject. (7 Co., 19; 6 Hard. 27, 170, 230, 502; 4 Co. Inst., 190.)"

(6) *Plimmer v. Wellington*, L. R., 9 App. Cas. 699; wherein the Privy Council held that Plimmer, who, with permission of the Government, had constructed, on land covered by tide water the title to which was vested in the Government of New Zealand, a jetty and warehouse and had reclaimed from the sea certain land whereon his improvements were constructed, thereby acquired an interest or estate in such lands, although he had originally taken possession of said lands under

a revocable license for the special purpose of a wharfinger, his license having become irrevocable by his construction of said improvements with the consent and in part at the request of the Government.

From the foregoing analysis of the Act of February 15, 1901, construed as if it stood alone and unaided by the earlier Acts of Congress relating to rights of way, it is evident that the Act of February 15, 1901, is not inconsistent or in conflict with the earlier Acts, whose construction and operation have been considered under Propositions No. 1 and No. 2, for the following reasons:

1. The Act of February 15, 1901, (by expressly authorizing the issuance of permits granting authority to the permittees to construct, upon the public lands, forest and other reservations of the United States reservoirs and canals, while it is silent upon the subject of the right to appropriate water for beneficial uses) assumes by necessary implication the right to appropriate, store, convey and use water for every beneficial use, either under the laws of the United States or the laws of the several states, and, therefore, is clearly consistent with sections 2339 and 2340 of the United States Revised Statutes, the Act of March 3, 1877, and the Act of June 4, 1897, in so far as they grant, as against the United States in its capacity as riparian proprietor, the right to appropriate and take the water of non-navigable lakes, rivers and streams upon the public lands and forest reservations of the United States;

2. The result obviously intended by the Act of February 15, 1901, and actually accomplished whenever any citizen, association or corporation of the United States, acting under the authority of a permit issued pursuant to its provisions, constructs and puts to use a reservoir or canal, namely, the acquisition of a vested and accrued right of way for such reservoir or canal, is exactly the same as the result accomplished by the construction and

beneficial use of a reservoir or canal under the provisions of sections 2339 and 2340 of the United States Revised Statutes, the Act of March 3, 1891, and the amendment thereto contained in the second section of the Act of May 11, 1898; and, therefore, said Act of February 15, 1901, is consistent with the earlier Acts of Congress last mentioned in respect to the ultimate purpose or object sought to be accomplished by them; and

3. The only difference between the Act of February 15, 1901, and sections 2339 and 2340 of the United States Revised Statutes and the Act of March 3, 1891, and the amendment thereto contained in the Act of May 11, 1898, so far as the latter relate to rights of way for reservoirs and canals, lies in the procedure prescribed for the accomplishment of their ultimate purposes or objects, viz, the vesting and accruing of rights of way and the appropriation and utilization of the waters of non-navigable lakes, rivers and streams upon the public lands and forest reservations of the United States; and the Act of February 15, 1901, contains no provision expressing the purpose or intent of Congress to make the procedure thereby provided for exclusive of the procedure contemplated and provided for in its earlier Acts last mentioned; and, therefore, the Act of February 15, 1901, merely adds to the procedure authorized by the aforesaid earlier Acts a new permissive procedure and, consequently, is consistent with the continued existence of said earlier Acts.

This branch of the argument may be summed up as follows:

1. The Act of February 15, 1901, does not expressly repeal the Acts of Congress considered under Propositions No. 1 and No. 2.
2. The weight of authority and the practice of the Department of the Interior support the position that the Act of February 15, 1901, does not repeal by implication the earlier Acts considered under Propositions No. 1 and No. 2.

3. A construction of the Act of February 15, 1901, in harmony with the earlier Acts considered under Propositions No. 1 and No. 2, if such construction be possible, is required by the law as declared by this Court.

4. The Act of February 15, 1901, does not cover any of the essential features of the earlier Acts considered under Propositions No. 1 and No. 2, but, on the contrary, assumes the continued existence of the substantive rights which are recognized or granted by said earlier Acts.

5. The Act of February 15, 1901, considered and construed in connection with the earlier Acts of Congress relating to the same subject is in no respect in conflict with any of the Acts dealt with under Propositions No. 1 and No. 2, but, on the contrary, supplements them by conferring additional administrative authority upon the Secretary of the Interior and authorizing the latter to adopt a procedure whereby a person desirous of acquiring a right of way may give public notice of his location and obtain a determination in advance of construction that such right of way has been properly located, whether the lands upon which such right of way is located are surveyed or unsurveyed, or it is impracticable or inconvenient for any other reason to meet the conditions prescribed by section 19 of the Act of March 3, 1891.

6. The Act of February 15, 1901, construed as if it stood alone and unaided by the earlier Acts considered under Propositions No. 1 and No. 2, but in the light of the general principles of law to which reference has been made, is not in conflict with the latter because it assumes the continued existence of the right to appropriate water for beneficial uses under the laws of the United States or of the several states, plainly intends the accomplishment of the same ultimate purpose or object, namely, the acquisition and use of vested and accrued rights of way, and merely adds a new procedure, permissive in its nature, for the accomplishment of such ultimate purpose or object without expressing any intention to make such procedure exclusive of the procedure provided for in earlier Acts.



The Act of February 15, 1901, containing no expression of a purpose to repeal any of the Acts considered under Propositions No. 1 and No. 2, and neither covering any of their essential features nor being in conflict with any of their provisions, and, instead of being intended as a substitute for them, assuming their continued existence and supplementing their administrative provisions, plainly, under the rule declared by this Court in *Town of Red Rock v. Henry, supra*, is not to be construed as substantive legislation superseding or by implication repealing any of the Acts of Congress considered under Propositions No. 1 and No. 2.

#### PROPOSITION NO. 4.

*The aforesaid Act of February 15, 1901 (assuming that it is substantive legislation superseding and by implication repealing the other Acts of Congress already mentioned) is unconstitutional as involving an unauthorized delegation, to executive officers of the United States, by Congress, of power specifically and exclusively conferred by the Constitution upon the latter.*

“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”

Constitution, article IV, section 3, clause 2.

The power to dispose of the public lands, whether specially reserved or not, which includes of course the power to relinquish riparian rights incident to the ownership of such lands and to grant rights of way and other easements and servitudes affecting the same, and the power to make rules and regulations respecting such lands are, by this provision

of the Constitution, specifically conferred upon Congress. No such power is conferred on the President or the courts of the United States.

These powers, although in some sense proprietary rather than governmental, are, nevertheless, by general consensus of opinion as evidenced by the uniform practice of the government of the United States and the governments of the several states, deemed to be legislative in their nature. But, whether these powers be deemed strictly or only *quasi* legislative, having been delegated to Congress exclusively, they are equally within the reason and subject to the operation of the rule that,

“The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.”

Cooley's Constitutional Limitations (7th ed.), page 163.

To those of us who believe in a government of law made, executed, construed and enforced by the chosen representatives of a free, honorable and self-respecting people, as the best means of establishing justice, insuring domestic tranquility, providing for the common defense, promoting the general welfare and securing the blessings of liberty to ourselves and our posterity, the most vital principle, the chief merit, and the most essential safeguard of the liberty of the citizen embodied in our system of Constitutional government is the division of all the powers of government into the three great classes, the legislative, the executive and the judicial, and the vesting of each one of these three classes of powers in a separate and distinct branch of the government. Without this feature all of the express limitations upon the powers of government contained in the Constitution would be ineffective checks upon the exercise of arbitrary and despotic power.

The importance of the division of the powers of government between its legislative, executive and judicial branches has been recognized and declared by this Court in many well-considered opinions.

In *Kilbourn v. Thompson*, 103 U. S. 168, 190-192, this Court, in its opinion delivered by Mr. Justice Miller, said:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress.

"This, however, is so only to a limited extent, for a bill may become a law notwithstanding the refusal of the President to approve it, by a vote of two-thirds of each House of the Legislature.

"So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The Senate also exercises the

judicial power of trying impeachments, and the House of preferring articles of impeachment.

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary Articles, the allotment of power to the executive, the legislative, and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them."

In *Field v. Clark*, 143 U. S. 649, 692, this Court said:

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

In the dissenting opinion in this case, written by Mr. Justice Lamar with whom concurred Mr. Chief Justice Fuller, it is said (page 697):

"The Chief Justice and myself concur in the judgment just announced. But the proposition maintained in the opinion, that the third section, known as the reciprocity provision, is valid and constitutional legislation, does not command our assent, and we desire to state very briefly the ground of our dissent from it. We think that this particular provision is repugnant to the first section of the first article of the Constitution of the United States, which provides that 'all legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.' That no part of this legislative power can be delegated by Congress to any other department of the government, executive or judicial, is an axiom in constitutional law, and is universally recognized as a principle essential to the integrity and maintenance of the system of government ordained by the Constitution. The legislative power must remain in the organ where it is lodged by that instrument. We think that the section in question does delegate legislative power to the executive department, and also commits to that department matters belonging to the treaty-making power, in violation of paragraph two of the second section of article two of the Constitution."

The principle that Congress cannot delegate to the courts, or to any other tribunal, body or officer, powers which are strictly and exclusively legislative, which was declared by Chief Justice Marshall in,

*Wayman v. Southard*, 10 Wheat. 1, 42,

has never been questioned by this Court. But many questions of great difficulty and delicacy have arisen concerning the precise boundaries between the legislative, the executive and the judicial powers, because the Legislature, in the exercise of the power conferred upon it, must, as a matter of practical necessity, commit something to the discretion of the executive and judicial branches.

Because of the great delicacy and difficulty of the question whether or not the Act of February 15, 1901, is an unconstitutional delegation to executive officers of power which is legislative in its nature and exclusively conferred by the Constitution upon Congress, it is of the highest importance that there be presented here such rules as have been established by this Court in determining the boundary between legislative and executive power. These rules are as follows:

1. The legislature alone can make law; and the power to make law cannot be delegated.

*Wayman v. Southard, supra.*

*Union Bridge Co. v. United States*, 204 U. S. 364, 378-388.

2. "The legislature must declare the policy of the law and fix the legal principles which are to control in given cases".

*Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U. S. 230, 245.

*Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 214.

3. The legislature, having enacted a law, may delegate to an executive or administrative board, commission or officer "a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend".

*Union Bridge Co. v. United States, supra.*

*Monongahela Bridge Co. v. United States*, 216 U. S. 177, 192-3.

*Field v. Clark, supra.*

*Miller v. Mayor etc. of New York*, 109 U. S. 385, 394.

4. The legislature, having declared the policy of the law and prescribed the legal principles which are to control in given cases, may delegate to executive and

administrative officers and bodies power to ascertain the facts and conditions to which such policy and principles apply.

Mutual Film Corporation v. Industrial Commission of Ohio, *supra*.

Buttfield v. Stranahan, 192 U. S. 470, 496.

Interstate Commerce Commission v. Goodrich Transit Co., *supra*.

5. The legislature, having enacted a statute declaring the policy and prescribing the principles of law to govern a particular subject matter, may delegate to executive and administrative officers or bodies the power to adopt reasonable regulations appropriate for effectuating such policy and principles and not in conflict with the law itself.

Ex Parte Kollock, 165 U. S. 526, 533.

Butte City Water Co. v. Baker, 196 U. S. 119, 125-7.

United States v. Grimaud, 220 U. S. 506.

Light v. United States, 220 U. S. 523.

6. The legislature, however, cannot delegate to an executive or administrative officer or body authority to make, alter or amend a law or to make or enforce regulations in conflict with the law.

United States v. Eaton, 144 U. S. 677.

United States v. Grimaud, *supra*.

Harmon v. State, 66 Ohio St. 249, 58 L. R. A. 618.

State v. Burdge, 95 Wis. 390, 37 L. R. A. 157.

O'Neil v. American Fire Ins. Co., 166 Penn. St. 72, 26 L. R. A. 715.

Mutual Film Corporation v. Industrial Commission of Ohio, *supra*.

The Act of February 15, 1901, if it be construed to be in conflict with the others Acts of Congress considered under



Propositions No. 1 and No. 2, or as having been intended as a substitute for such Acts, repeals all of the earlier general laws of Congress whereby Congress had itself established all needful rules and regulations respecting the appropriation of water and the appropriation and acquisition of rights of way for reservoirs and canals upon the public lands and reservations of the United States and, consequently, must be construed without any aid derived from such Acts. So construed the Act of February 15, 1901, is a naked delegation of authority to the Secretary of the Interior to adopt general regulations and, in accordance therewith, to permit the use of rights of way through the public lands, forest and other reservations of the United States for the purposes therein specified, without any other limitation than that contained in the first proviso, namely, "that such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest". This Act neither declares any policy of law nor fixes any legal principle to control the Secretary of the Interior in adopting or enforcing general regulations or in granting or refusing to grant a permit for the use of any right of way. This Act, instead of expressing the will of Congress that the use of rights of way shall be permitted upon certain terms or conditions and delegating to the Secretary of the Interior the power to determine the facts or state of things upon which its action is to depend, leaves it to the discretion of the Secretary of the Interior to grant or refuse to grant permission to use a right of way without reference to the facts upon which application is made. The general regulations to be fixed by the Secretary of the Interior under this Act are not expressly required to be in harmony with its provisions or to be such as are appropriate for effectuating any policy or

principle of law expressed therein, and resort to implication is in vain for the reason already mentioned that neither policy of law nor legal principle is declared in the Act, unless it be construed as declaring the intention of Congress that the use of rights of way for the purposes specified therein shall be permitted in every instance except when such use is incompatible with the public interest. This Act, at the time of its adoption and in the absence of general regulations fixed by the Secretary of the Interior, was (if we assume that it superseded and repealed the earlier legislation and did not impose upon the Secretary of the Interior the duty of permitting the use of rights of way in every instance except when such use was incompatible with the public interest) wholly devoid of every essential attribute of a law as it contained no rule of conduct, nor declaration of legal policy or principle nor any rule or regulation governing the disposal or use of the territory or other property belonging to the United States.

Even if the Act of February 15, 1901, should be construed as imposing upon the Secretary of the Interior the duty of permitting the use of rights of way through the public lands, forest and other reservations of the United States upon the application of any citizen, association or corporation in every instance when such use "is not incompatible with the public interest", it would still involve a delegation to the Secretary of the Interior of the right and power to determine what the "public interest" requires, because it neither contains a declaration of any legal policy or principle in accordance with which the Secretary of the Interior may be guided in determining what is or is not compatible with the public interest nor is capable of being aided in this respect by any other legislation upon the subject. "Public interest" as used in this statute obviously means "public policy". What "public policy" is can only be determined by reference to the law of the land embodied in the Constitution, statutes enacted by the legislature, and the rules of the common law and general principles of juris-

prudence declared in judicial decisions. It is the province of the legislature to determine what "public policy" shall be and what the "public interest" requires. These propositions are, I submit, fully supported by the following authorities:

- Vidal et al. v. Girard's Executors*, 2 How. 127, 197-8;
- License Tax Cases*, 5 Wall. 462;
- St. Louis Mining and Milling Co. v. Montana Mining Co.*, 171 U. S. 650, 655-6;
- Hartford Fire Insurance Co. v. Chicago M. & St. P. Ry. Co.*, 175 U. S. 91, 100;
- Baltimore and Ohio S. W. Ry. Co. v. Voigt*, 176 U. S. 498, 505;
- Grafton County E. L. & P. Co. v. State*, 77 N. H. 539, 94 Atl. 193, 194;
- Julien v. Model Building, L. & I. Assn.*, 116 Wis. 79; 61 L. R. A. 668, 672;
- Greenhood on Public Policy in the Law of Contracts*, Rule CXL, citing *Pierce v. Randolph*, 12 Tex. 290.

From the foregoing analysis of the Act of February 15, 1901,\* it plainly appears that the powers delegated thereby to the Secretary of the Interior are legislative in character and that Congress (assuming that it intended this Act to operate as a repeal of its aforesaid earlier Acts) attempted thereby to make a delegation to the Secretary of the Interior of the entire power conferred upon it by the second clause of section 3 of article IV of the Constitution, so far as that clause applies to the subject matter of this Act, namely, rights of way over public lands and reservations of the United States for the purposes therein specified.

Furthermore, an exercise of the power attempted by said Act of February 15, 1901, to be delegated to the Secretary of the Interior (namely, the power to permit or refuse to permit, in his discretion, and to regulate, the occupancy and use of rights of way for reservoirs and canals through the

public lands and reservations of the United States) involves an exercise of a discretionary power to permit or prevent the use of the waters of lakes, rivers and streams on the vast areas of the public lands and reservations of the United States for any public or private use in the public land states and thus to control, interfere with, or prevent, the exercise by the several states, wherein are situate public lands and reservations, of their undoubted constitutional right and power to provide for such vital public services as the furnishing of water, light and power for their inhabitants. Surely the power granted to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"—a power which is primarily proprietary rather than governmental—could not have been intended to include the power to prevent the states from exercising any of the necessary governmental powers reserved to them by the tenth amendment to the Constitution.

Consequently this Act of February 15, 1901, constitutes, not only an attempt on the part of Congress to delegate powers vested in it exclusively by the Constitution, but also an attempt on the part of Congress to authorize the Secretary of the Interior to usurp powers which under the Constitution are not delegated to the United States, but, on the contrary, are reserved to the states. That the Secretary of the Interior and the Secretary of Agriculture have not been slow to act upon the supposed authority of this Act of February 15, 1901, and to usurp, under the color of authority thereby conferred, vast powers of regulation of subjects concerning which Congress itself has no power to legislate is disclosed by the regulations printed in the transcript, pages 32 to 134, and discussed at length in the brief of appellant, The Beaver River Power Company.

As authorities for the proposition that Congress does not possess the power to regulate or to interfere with the appropriation or use of any waters within the boundaries of any state, except so far as it may be necessary to prevent inter-

ference with or obstruction of navigable waters capable of being used as a means of interstate or foreign commerce, or to prevent interference with or destruction of the rights of the United States as owner of riparian lands, I rely upon the following cases, viz:

United States *v.* Rio Grande Dam and Irrigation Company, 174 U. S. 690;  
 Kansas *v.* Colorado, 206 U. S. 46, 85-96, 117;  
 Hudson County Water Company *v.* McCarter, 209 U. S. 349;  
 United States *v.* E. C. Knight Company, 156 U. S. 1.

#### PROPOSITION NO. 5.

*The aforesaid Act of Congress of February 15, 1901, (assuming that it is substantive legislation superseding and by implication repealing the other aforesaid Acts of Congress and is not unconstitutional) is itself superseded and repealed, so far as it applies to rights of way for reservoirs and aqueducts appropriated for "municipal", that is to say public or governmental uses, by section 4 of an Act entitled, "An Act Providing for the Transfer of Forest Reserves from the Department of the Interior to the Department of Agriculture", approved February 1, 1905, (33 U. S. Stat. at L., 628).*

The Act of February 1, 1905, (33 U. S. Stat. at L., 628—see Appendix page 21) provides, in section 4, "that rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the

laws of the State or Territory in which said reserves are respectively situated."

That the grant of rights of way made by this section may be accepted and availed of, not only by municipal corporations and miners, but also by any citizen or any corporation of the United States who chooses to engage in the business of appropriating, storing, conveying, distributing and selling water "for municipal or mining purposes" seems too plain to require argument or citation of authorities. But, as plaintiff appears to have contended in the District Court that this Act is not to be so construed, I refer this Court to the case of

Gutierrez v. Albuquerque Land and Irrigation Co., 188  
U. S. 545, 555-6,

wherein a similar contention concerning the aforesaid Act of March 3, 1877, was rejected by this Court in the following paragraph which I quote from its opinion:

"We perceive no merit in the contention that the proviso in the desert land act of March 3, 1877, declaring that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights, is an expression of the will of Congress that all public waters within its control or the control of a legislative body of its creation, must be *directly* appropriated by the owners of land upon which a beneficial use of water is to be made, and that in consequence a territorial legislature cannot lawfully empower a corporation, such as the appellee, to become an intermediary for furnishing water to irrigate the lands of third parties. As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly public (Fallbrook Irrig. Dist. v.

Bradley, 164 U. S. 163, 41 L. ed. 390, 17 Sup. Ct. Rep. 56), and appellee is therefore a public agency, whose right to divert water and whose continued existence is dependent upon the application by it within a reasonable time of such diverted water to a beneficial use. Irrigation corporations generally are recognized in the legislation of Congress, and the rights conferred are not limited to such corporations as are mere combinations of owners of irrigable land."

If the Act of February 15, 1901, repealed by implication the aforesaid earlier Acts of Congress, authorized the Secretary of the Interior to grant permits or licenses, revocable in his discretion, for the occupancy and use of rights of way for reservoirs and canals to be used for the purposes therein specified, and is not unconstitutional, then plainly this Act of February 1, 1905, which makes a direct grant of rights of way for reservoirs, canals and other aqueducts for the purposes therein specified "during the period of their beneficial use" supersedes and by implication repeals said Act of February 15, 1901, so far as the latter act originally applied to rights of way for reservoirs and aqueducts "within and across the forest reserves of the United States \* \* \* for municipal or mining purposes, and for the purposes of milling and reduction of ores", because the provisions of section 4 of this Act of February 1, 1905, are utterly and completely inconsistent, to the extent which I have just indicated, with the provisions of said Act of February 15, 1901.

To determine the extent to which section 4 of said Act of February 1, 1905, operates as a repeal by implication of said Act of February 15, 1901, it is necessary to consider the denotation of the term "*municipal*" used in describing the purposes for which rights of way are granted by said section 4. The denotation of the term "*municipal*" is not limited to things pertaining to an incorporated city or town, but includes all matters and things "pertaining to the internal affairs of a state, kingdom or nation and its citizens." See sub. nom. municipal—



Century Dictionary;  
 Bouvier's Law Dictionary;  
 Cyc., volume 28, page 53; and  
 Words and Phrases.

Nowhere have I found a better discussion of the meaning of the word "*municipal*" than in the following quotation from the opinion of the Supreme Court of Oregon in

*Cook v. Port of Portland*, 20 Or. 580, 583, 27 Pac. 263, 13 L. R. A. 533:

"The whole question, therefore, turns upon the meaning of the phrase 'municipal purposes,' as used in the Constitution. The word 'municipal' is defined by the lexicographers as belonging to a city, town, or place; having the right of local government; belonging to or affecting a particular State or separate community; local; particular; independent. It is usually applied to what belongs to a city, but has a more extensive meaning, and is in legal effect the same as public or governmental, as distinguished from private. Burrill, Dict. title *Municipal*. Thus we call municipal law not the law of a city only, but the law of the State. 1 Bl. Com. 44. Municipal is used in contradistinction to international. Thus we say an offense against the law of nations is an international offense, but one committed against a particular State or separate community is a municipal offense. And so are municipal affairs public affairs, and municipal purposes are public or governmental purposes, as contradistinguished from private purposes. A corporation, therefore, created for municipal purposes is a corporation created for public or governmental purposes with political powers to be exercised for the public good in the administration of civil government, whose members are citizens, not stockholders; an instrument of the government, with certain delegated powers, subject to the control of the Legislature, and its members, officers, or

agents of the government for the administration or discharge of public duties. A city, or purely municipal corporation, is perhaps the highest type of a corporation created for municipal purposes, because it is a miniature government, having legislative, executive, and judicial powers; but there is another class of corporations, such as counties, school districts, road districts, etc., which, though varying in application and peculiar features are but so many agencies or instrumentalities of the State to promote the convenience of the public at large and are, in the broadest use of the term, for municipal purposes. It would be a narrow and unwarranted construction of the language to say that 'municipal purposes' means only city, town, or village purposes. The Constitution of this State evidently contemplates the creation of counties under the direct supervision of and by special Act of the Legislature, yet no direct power is given to create them, and the section under consideration contains a direct prohibition against doing so, unless the word 'municipal' covers this class of corporations. We thus perceive that the word 'municipal' not only applies to cities, towns, and villages, but has a broader and more general signification relating to the State or nation. And therefore the words 'municipal corporations', as applied to incorporated cities or towns, and 'municipal purposes', are not synonymous. The latter embrace, by the common speech of men before and since the days of Blackstone, state or national purposes. And therefore, while cities, towns, and villages are for municipal purposes, there are also other corporations for municipal purposes that are not of that class. It was in the broader and more general sense of the term that the words 'municipal purposes' were used in the Constitution of this State. This is evident from section 9 of the same article of the Constitution, wherein it is provided that no county, city, town, or other municipal

corporation, by a vote of its citizens or otherwise, shall become a stockholder in any joint stock company, corporation, etc. Here is a direct interpretation from the Constitution itself. A municipal corporation is not necessarily a county, city, or town. Were it so, the added words, 'or other municipal corporation', would be without meaning. Clearly a corporation for municipal purposes is one composed of citizens, as distinguished from stockholders; a public, as distinguished from a private, corporation."

In view of the facts that the use of water is as essential to the inhabitants of the country as to the inhabitants of incorporated cities and towns and that, in many parts of the states wherein are situated public lands and forest reservations of the United States, the chief sources of water supply for all public purposes, whether in city or in country, are the non-navigable lakes and streams on such public lands and reservations, it seems reasonable to suppose that Congress (assuming that body to be aware of the narrow and unconstitutional construction placed by the Department of the Interior and Department of Agriculture on said Act of February 15, 1901) intended, in enacting said Act of February 1, 1905, to remedy the intolerable conditions then existing, and, to that end, granted, by section 4 of the last mentioned Act, all rights of way for reservoirs and aqueducts required for all public purposes, whether served directly by the states or their municipal corporations or political subdivisions, or indirectly through the agency of natural persons or private corporations.

Under this interpretation of the term "municipal", as employed in section 4 of said Act of February 1, 1905, the grant made by said section is broad enough to include, and I submit that it should be construed as including, a grant of rights of way for reservoirs and canals for impounding, storing, and conveying water to be used for the generation of electric power by any corporation which distributes and sells

such electric power to a state or any of its municipalities or subdivisions and the inhabitants thereof in the same manner as other public uses are served. Consequently the decree of the District Court in this case should be reversed by reason of the provisions of this Act alone, whatever may be decided concerning the construction or constitutionality of the Act of February 15, 1901.

Respectfully submitted,

WM. B. BOSLEY,  
*Amicus Curiae.*

San Francisco, California, May 29, 1916.

# **APPENDIX**

**CONTAINING**

**Extracts from the Statutes of the United States**

**RELATING TO WATER RIGHTS AND  
RIGHTS OF WAY FOR RESERVOIRS  
AND CANALS UPON THE PUBLIC  
LANDS AND RESERVATIONS OF THE  
UNITED STATES**



**EXTRACTS FROM THE STATUTES OF THE UNITED STATES  
RELATING TO WATER RIGHTS AND RIGHTS OF WAY FOR  
RESERVOIRS AND CANALS UPON THE PUBLIC LANDS  
AND RESERVATIONS OF THE UNITED STATES.**

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CHAP. CCLXII. AN ACT GRANTING THE RIGHT OF WAY TO  
DITCH AND CANAL OWNERS OVER THE PUBLIC LANDS, AND  
FOR OTHER PURPOSES.

Approved July 26, 1866.

14 U. S. Stats. at L., 251.

. . . . .

Sec. 9. *And be it further enacted*, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

. . . . .



CHAP. CCXXXV. AN ACT TO AMEND "AN ACT GRANTING  
THE RIGHT OF WAY TO DITCH AND CANAL OWNERS OVER  
THE PUBLIC LANDS AND FOR OTHER PURPOSES."

Approved July 9, 1870.

16 U. S. Stats. at L., 217.

. . . . .

Sec. 17. *And be it further enacted*, That none of the rights conferred by Sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. But nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the "Act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

*Revised Statutes of the United States.*

Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

CHAP. 107. AN ACT TO PROVIDE FOR THE SALE OF DESERT  
LANDS IN CERTAIN STATES AND TERRITORIES.

Approved March 3, 1877.

19 U. S. Stats. at L., 377.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, provided however that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall*

be issued to him. *Provided*, That no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

Sec. 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—

Sec. 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

CHAP. 561. AN ACT TO REPEAL TIMBER-CULTURE LAWS, AND  
FOR OTHER PURPOSES.

Approved March 3, 1891.

26 U. S. Stats., at L., 1095, 1101-3.

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Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

Sec. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch,

or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Sec. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

Sec. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

. . . . .

Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

CHAP. 37. AN ACT TO PERMIT THE USE OF THE RIGHT OF  
WAY THROUGH THE PUBLIC LANDS FOR TRAMROADS,  
CANALS, AND RESERVOIRS, AND FOR OTHER PURPOSES.

Approved January 21, 1895.

28 U. S. Stats. at L., 635.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber.*



CHAP. 179. AN ACT TO AMEND THE ACT APPROVED MARCH  
THIRD, EIGHTEEN HUNDRED AND NINETY-ONE, GRANTING  
THE RIGHT OF WAY UPON THE PUBLIC LANDS FOR RESER-  
VOIR AND CANAL PURPOSES.

Approved May 14, 1896.

29 U. S. Stats. at L., 120.

*Be it enacted by the Senate and House of Representatives  
of the United States of America in Congress Assembled, That  
the Act entitled "An Act to permit the use of the right of  
way through the public lands for tramroads, canals, and  
reservoirs, and for other purposes," approved January twenty-  
first, eighteen hundred and ninety-five, be, and the same is  
hereby, amended by adding thereto the following:*

"Sec. 2. That the Secretary of the Interior be, and hereby  
is, authorized and empowered, under general regulations to  
be fixed by him, to permit the use of right of way to the extent  
of twenty-five feet, together with the use of necessary ground,  
not exceeding forty acres, upon the public lands and forest  
reservations of the United States, by any citizen or association  
of citizens of the United States, for the purposes of generating,  
manufacturing, or distributing electric power."

CHAP. 335. AN ACT TO PROVIDE FOR THE USE AND OCCUPATION  
OF RESERVOIR SITES RESERVED.

Approved February 26, 1897.

29 U. S. Stats. at L., 599.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: Provided, That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.*

CHAP. 2. AN ACT MAKING APPROPRIATIONS FOR SUNDRY CIVIL  
EXPENSES OF THE GOVERNMENT FOR THE FISCAL YEAR  
ENDING JUNE THIRTIETH, EIGHTEEN HUNDRED AND NINE-  
TY-EIGHT, AND FOR OTHER PURPOSES.

Approved June 4, 1897.

30 U. S. Stats. at L., 11, 34-36.

. . . . .

All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this Act or such rules and regulations shall be punished as is provided for in the Act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers,

miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereof, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.

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CHAP. 292. AN ACT TO AMEND AN ACT TO PERMIT THE USE  
OF THE RIGHT OF WAY THROUGH PUBLIC LANDS FOR  
TRAMROADS, CANALS, AND RESERVOIRS, AND FOR OTHER  
PURPOSES.

Approved May 11, 1898.

30 U. S. Stats. at L., 404.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Act entitled "An Act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:*

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

"Sec. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of Sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."



CHAP. 372. AN ACT RELATING TO RIGHTS OF WAY THROUGH  
CERTAIN PARKS, RESERVATIONS, AND OTHER PUBLIC LANDS.

Approved February 15, 1901.

31 U. S. Stats. at L., 790.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall*

be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

CHAP. 1093. AN ACT APPROPRIATING THE RECEIPTS FROM THE  
 SALE AND DISPOSAL OF PUBLIC LANDS IN CERTAIN STATES  
 AND TERRITORIES TO THE CONSTRUCTION OF IRRIGATION  
 WORKS FOR THE RECLAMATION OF ARID LANDS.

Approved June 17, 1902.

32 U. S. Stat. at L., 388.

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Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

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CHAP. 288. AN ACT PROVIDING FOR THE TRANSFER OF FOREST RESERVES FROM THE DEPARTMENT OF THE INTERIOR TO THE DEPARTMENT OF AGRICULTURE.

Approved February 1, 1905.

33 U. S. Stats. at L., 628.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That the Secretary of the Department of Agriculture shall, from and after the passage of this Act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the Act entitled "An Act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and Acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands.

Sec. 2. That pulp wood or wood pulp manufactured from timber in the district of Alaska may be exported therefrom.

Sec. 3. That forest supervisors and rangers shall be selected, when practicable, from qualified citizens of the States or Territories in which the said reserves, respectively, are situated.

Sec. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

Sec. 5. That all money received from the sale of any

products or the use of any land or resources of said forest reserves shall be covered into the Treasury of the United States and for a period of five years from the passage of this Act shall constitute a special fund available, until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement, and extension of Federal forest reserves.

CHAP. 456. AN ACT FOR THE PROTECTION OF THE PUBLIC  
FOREST RESERVES AND NATIONAL PARKS OF THE UNITED  
STATES.

Approved February 6, 1905.

33 U. S. Stats. at L., 790.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That* all persons employed in the forest reserve and national park service of the United States shall have authority to make arrests for the violation of the laws and regulations relating to the forest reserves and national parks, and any person so arrested shall be taken before the nearest United States commissioner, within whose jurisdiction the reservation or national park is located, for trial; and upon sworn information by any competent person any United States commissioner in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said laws and regulations; but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said laws and regulations.

CHAP. 152. AN ACT GRANTING TO RAILROADS THE RIGHT OF  
WAY THROUGH THE PUBLIC LANDS OF THE UNITED STATES.

Approved March 3, 1875.

18 U. S. Stats., at L., 482.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.*

Sec. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such

wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Sec. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the Act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Sec. 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

Sec. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.







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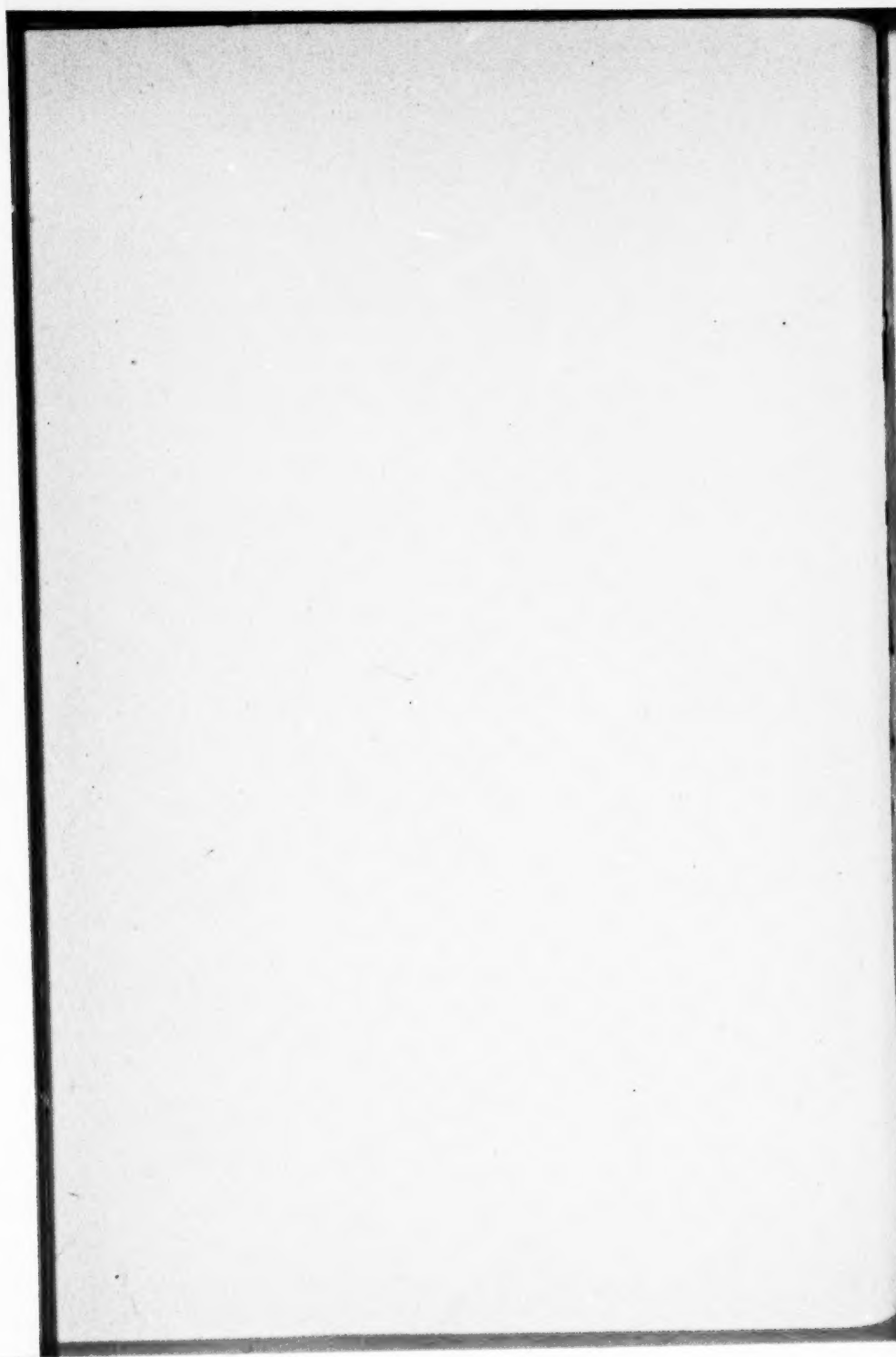
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# In the Supreme Court of the United States

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OCTOBER TERM, 1915.

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THE BEAVER RIVER POWER COMPANY,	<i>Appellant,</i>	} No. 574
vs.		
THE UNITED STATES,	<i>Appellee.</i>	

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THE UNITED STATES,	<i>Appellant,</i>	} No. 575
vs.		
THE BEAVER RIVER POWER COMPANY,	<i>Appellee.</i>	

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Appeals from the District Court of the United States, for  
the District of Utah.

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## BRIEF FOR APPELLANT THE BEAVER RIVER POWER COMPANY

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(All italics ours.)

### STATEMENT OF THE ISSUE.

This is an appeal from a decree of the District Court  
of the United States for the District of Utah, rendered

March 4, 1914, enjoining and restraining the appellant from maintaining and operating its power house, reservoir, pipe lines, telephone lines, transmission lines, dwelling-houses, blacksmith shop, work shop, stable and wagon shop and other outbuildings, now located upon certain lands of the United States, situated in the State of Utah; decreeing and adjudging the United States to be the true and lawful owner of the said lands; and quieting and confirming its title as against all claims, demands and contentions whatsoever of the appellant. (Trans. pp. 134, 135.)

This decree followed an order made by the District Court, striking the appellant's amended answer upon motion of the United States, upon the ground that the said answer does not state facts sufficient to constitute a defense to the cause of action set forth in appellee's (plaintiff in the court below) bill of complaint.

Notwithstanding the importance of this case to the parties, especially the appellant, the importance of the constitutional and fundamental questions involved, so far exceeds any possible interest of the parties that we will endeavor, in advance of any attempt to state the facts or to outline any of the numerous legal questions involved, to state, as it appears to us, the controlling issue in this case.

The first and paramount question for consideration,

which should be decisive of the case, is whether the existence of public lands within a state, and especially in the thirteen states in which there are still extensive areas of vacant public land, confers upon the federal government any greater governmental powers than it has in the states in which there is no public land. If the federal government has such additional power, the public-land states are not on an equal footing with the other states.

During the discussion in reference to legislation concerning public lands, there has been an unfortunate tendency during the past eight or nine years, on the part of those engaged in the discussion, as well as in the newspapers and periodicals of the country, to confuse this question with the so-called states'-rights issue which culminated in and was terminated by the Civil War.

The issue here, which concerns the preservation of the equality of the states and thereby the preservation of the Union, is exactly the converse of the contention made by certain states before the War that they might, by secession, destroy the Union. Looked at from the standpoint of the contention then made on behalf of the Union, the contention here made is its complement; both look to the preservation of the dual form of government established by the Constitution. This Court, through Chief Justice Chase, in *Texas vs. White*, 74 U. S. (7 Wall.) 700, said:

"THE CONSTITUTION, IN ALL OF ITS PROVISIONS, LOOKS TO AN INDESTRUCTIBLE UNION COMPOSED OF INDESTRUCTIBLE STATES."

Prior to this quotation the Chief Justice had said:

*"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence or of the right to self-government by the States."*

The controversy, of which this decision was one of the concluding chapters, arose out of the controversy as to "States' Rights"—the right of secession, so-called—and involved the perpetuity of the Union. The question we are here considering involves in a corresponding way the concluding statement of the sentence first quoted, namely, as to whether the Union is composed of "indestructible states."

If it be said that the controversy here does not literally involve the destruction of any state, our reply is that any State of the Union that is deprived of its equal right and opportunity of development including its governmental powers over the construction, operation and control of necessary ways and public uses, or that is limited in or obliged to divide in any exceptional way its full functions and governmental authority with the Federal Government, or that is obliged to submit to conditions or charges amounting to an excise tax upon an industry, is of necessity upon an unequal footing with the other States.

And when the equality of a State is destroyed, with relation to the fundamental consideration that this Union is and can be composed only of states equal in power, dignity and authority the state is in effect destroyed as a state, and necessarily the perpetuity of the Union is endangered.

As we shall proceed with the statement of the facts in this case, which are undisputed, and the questions of constitutional law and governmental right and the nature and effect of the judgment appealed from, it will be made clear to the point of demonstration that the decision in this case does directly involve the question of the indestructibility, or in any event, the equality, of the states of this Union.

There may be efforts to evade, modify or escape the conclusions just stated, and there may be the effort to interpose the argument that the Federal Government is asserting a mere proprietary right, and coupled with its exemption from the processes, if not the right, of eminent domain, is imposing only a contractual relation upon the state or its agencies.

However adroit such arguments may be, they are mere subtleties in the end. The fact remains that the control, authority, regulation, impositions and interferences asserted could come from no mere proprietary right, and could arise only out of an assertion of governmental

authority, and that the ends sought are mainly governmental, and the effect is to give to the Federal Government added powers and to leave the State with less power, and to impose unequal charges upon industries within the State and to allow the Federal Government to collect excise charges upon such industries, and to impose governmental regulations upon them which could not be imposed in any State wherein there were no public lands.

In the face of the results that must flow from and follow the exercise of such powers as are here proposed by the Federal Government, to claim that it is not an assertion of unequal governmental powers is a mere evasion of the truth, and especially in the affairs of government, an evasion of the truth is the worst form of falsehood. The question is never as to the way a thing is done or under what nominal claim of right or principle the thing may be done or attempted, but the question is as to the ultimate effect and the actual operation; and when the ultimate effect and the actual operation of the claims here in controversy with the appellee, the United States, are considered, the question inevitably reverts to whether or not the United States may in the public land States successfully assert unequal rights and authority and as to whether such public land States are in all respects whatsoever equal members of the Federal Union.

## STATEMENT OF FACTS.

No evidence was taken in the court below but, after the filing of the amended answer, the appellee, the United States moved to strike the same from the files, and, in deference to the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *United States vs. Utah Power & Light Company*, 209 Fed. 554, the motion was granted. The case, therefore, comes to this court upon what amounts to an agreed statement of the facts from which, when fully understood, the issues of law involved are clear; and, while these issues involve the construction of Acts of Congress and of rules and regulations of the Departments, and numerous questions that arise thereon and in connection therewith, the controlling question first above outlined is the question to which we ultimately come and is the question that in all probability will control the final decision of this court. We will endeavor to fully, but as succinctly as possible, set forth the facts so admitted on the record.

Following for this purpose the amended answer, the appellant, The Beaver River Power Company, it is stated, is a corporation, organized under the laws of the State of Colorado and duly qualified to carry on business in the State of Utah; and, at the time of the commencement of this action, it had developed and, since April 1st, 1908, had been operating a hydro-electric power plant with its



appurtenances and serving the public in the State of Utah with electric power for the operation of mining and other industries, for the pumping of water for irrigation and domestic uses, and for the lighting of municipalities and all other purposes for which such power is adapted. (Trans. pp. 11 and 12.)

Assuming that the appellant's rights have vested in connection with the public land occupied by its canals, diverting works, transmission lines, et cetera, and are essential to the public use, it is denied that the lands so occupied belong to the United States, appellee herein. (Trans. p. 12.)

Certain allegations of the complaint respecting the establishment of forest reserves over the land occupied are denied. The connected facts, however, are alleged in the amended answer and will later be set out. (Trans. p. 12.)

In addition to setting forth its claim of ownership of the property described in the complaint connected with the hydro-electric plant, the appellant describes in its amended answer certain other properties owned by it, together with certain connected water rights, the operation, location and use of all of which properties and waters are fully set forth and described. (Trans. pp. 13 and 14.)



It is alleged as to certain waters that they have been appropriated, reservoired, withheld and beneficially used since in or prior to the year 1895, and that the right so to do has vested in the appellant. (Trans. p. 13.)

Further appropriations and beneficial uses of the waters of the South Fork of the Beaver River are alleged to have been initiated and acquired at or about the 5th of July, 1895, and the continued enjoyment and beneficial use of the same is alleged; and it is alleged that the same are now diverted and used as an essential part of the water appropriations and hydro-electric system of the appellant. (Trans. p. 14.)

The allegation that no permission for the construction or maintenance of the said hydro-electric works, power houses, and structures was ever given by the United States Government is denied, and later and in connection with this denial the appellant fully and definitely sets out the facts and circumstances connected with such construction and use. (Trans. p. 14.)

The allegation that the appellant has been afforded the fullest or other opportunity to comply with the acts of Congress, is denied, and the facts and circumstances in that connection are also set out in the amended answer. (Trans. p. 14.)

Also the allegations of wilful failure and refusal to comply with the acts of Congress, are denied, and the

facts in this connection are also set out in the amended answer. (Trans. pp. 14 and 15.)

The appellant admits its intention to continue to operate its said hydro-electric works, and that it will so do unless restrained by the court, but denies that the same is unlawful or wilful and in violation of the laws of the United States. (Trans. p. 15.)

The allegation that the appellant's exclusive or other occupation of the said lands is a continuing or other trespass, or that the same constitutes a public nuisance, is specifically denied. (Trans. pp. 15 and 16.)

Coming now to appellant's affirmative defenses, it alleges that it holds a perpetual right over and upon the lands described in the complaint for the appropriation and beneficial use of said water and for the occupancy and use of said power houses, pipe lines, conduits, transmission lines, reservoirs, telephone lines and buildings and structures, and that the right, title and interest of the appellee, the United States, and its right to the possession and use of the lands described in the complaint is wholly subject and subordinate to the rights, uses, et cetera, of the appellant. (Trans. p. 16.)

Reference is made to the order of August 20, 1902, creating a temporary forest reserve, which order it is stated was vacated on April 18, 1904, as to certain described lands, and on October 5, 1905, as to the remaining

lands included therein whereby said lands were restored to settlement. It is also shown that the lands included in the first mentioned order of restoration remained open, unoccupied and unreserved public lands of the United States to and including April 25, 1907, while that included in the later order of October 5, 1905, remained unreserved until the creation of the Beaver National Forest on January 24, 1906. (Trans. pp. 16 and 17.)

The appellant alleges and asserts that the lands referred to were not withdrawn from the rights, uses or occupancies referred to and described in plaintiff's complaint either by the temporary order of August 20, 1902, or the later orders of January 24, 1906, and April 25, 1907, creating and enlarging such Beaver National Forest, but that during all of said times all of said lands were open to the use and enjoyment of the appellant for the appropriation and beneficial use of the waters appropriated and used and for the other rights and privileges indispensably connected therewith. (Trans. p. 17.)

Appellant also alleges that on and after the 5th of October, 1905, all the lands now or at any time used or occupied by it in connection with the appropriation and use of said water and of said hydro-electric works and transmission lines were open, unreserved public lands of the United States, and that on that day appellant's predecessors in interest were upon said lands and engaged

in the work of appropriating said water and applying it to its present beneficial use and had then given notice of appropriation of the same, and had and have complied with all of the laws of the State of Utah with respect thereto, and have ever since continued so to do and are now so doing. And that prior to the 15th of June, 1905, the appellant's predecessors had made appropriation of such waters and had expended large sums of money in the necessary work connected with such appropriation, and that on that date the appellee, the United States, through its officers, gave notice of its desire and intention to establish a forest reserve over and including said lands, et cetera, and thereupon it was arranged and agreed between the predecessors in interest of the appellant herein and the officers and representatives of the State of Utah and the appellee herein, its officers and representatives, that the appellee would, acting through the executive authority of the President of the United States, create the Beaver National Forest, covering and including the lands in question, and it was thereupon expressly understood and agreed that the establishing and creating of said national forest under the claims of the representatives of the appellee would seriously interfere with the appropriation and beneficial use of waters, etc., unless the rights and future procedure of the appellant and its predecessors were agreed upon, confirmed, etc. And that

it was thereupon arranged, understood and agreed upon by all of the parties interested that the executive order creating the said Beaver National Forest should be promulgated, but

"that a right of way, under the Act of February 1st, 1905, and which grants rights of way within and through the national forests during their period of beneficial use, to wit, during the period of the beneficial use of such appropriated waters, should be allowed and granted to the defendant's predecessors." (Trans. pp. 17 to 19.)

It is further stated that the executive order referred to was made on January 24, 1906, and thereafter,

"and consistent with the said understanding and arrangement and with the full notice, knowledge and acquiescence of the plaintiff herein, its officers and representatives, including the Secretaries of Agriculture and of the Interior, and the Forester in charge of the Forest Department of the United States, the predecessors in interest of defendant, being in and upon said Forest Reserve, continued and proceeded with the construction of the necessary dams, reservoir, ditches, aqueducts, and diverting works for the appropriation and beneficial use of said water, and also including the construction of the necessary power houses, appurtenances and equipments, and transmission lines for the production and distribution and beneficial use of the said waters, and of the electric power and energy generated thereby";

and that said hydro-electric works were continued with and completed during the years 1906 and 1907, and 1908,

and that in so doing the appellant expended in excess of \$500,000.00. (Trans. pp. 19 and 20.)

Without extending the statement in this connection, it is in substance averred that all of this was done and the hydro-electric system was established and the public service connected therewith established and developed with the acquiescence, approval and encouragement of said officers of the United States, and with the understanding that a perpetual right therefor could and would be confirmed in the appellant or its predecessors under the Act of February 1st, 1905, aforesaid,

“and not until after the completion of said works, and on or about the 13th day of April, 1910, the plaintiff herein, through its Secretary of Agriculture, notified the defendant herein that it would not grant the permit to the defendant herein for the beneficial uses in connection with its said power works, so described in plaintiff's complaint and described herein.” (Trans. p. 20.)

Also that the appellee demanded as a condition for being allowed to remain in the possession of and to enjoy the privilege of operating its plant and property, that the appellant should enter into certain permit agreements, subject to the rules and regulations of the Government of the United States, which are later set forth in full in the said amended answer. (Trans. p. 20 and pp. 32-60 and 60-134.)

All of the facts, circumstances and transactions in this connection are circumstantially and in the order of their occurrence set forth in the amended answer, and are admitted and undenied, and this case, therefore, presents no question of any forcible, wilful, unlawful entry or trespass, but there is clearly established a peaceable and lawful entry with the acquiescence of and the approval of the Government and its officers, and the development of a perfected water right under the laws of the State of Utah, and the investment of large sums of money necessary to such development, and the inauguration of an extensive and indispensable public service.

In a further affirmative answer the appellant sets forth a compliance with all of the laws of Congress and of the United States and of the State of Utah, and in this connection re-asserts the matters hereinbefore sufficiently set forth, and also sets forth the fact that as a condition permitting it to continue in the enjoyment of this property and in the performance of the public use in which it was engaged in the State of Utah, demand was made upon it that it should enter into such permit agreement and should acquiesce in such illegal, unauthorized and unreasonable rules and regulations, and that appellee has brought this action and seeks the relief prayed for in its complaint for the purpose of enforcing and compelling submission to such excessive, unreasonable, unlawful and



unauthorized rules and regulations. (Trans. pp. 22-23.)

In a further and separate answer and defense, the appellant sets forth again the facts and circumstances connected with its acquisition of these water rights and properties, and with special reference and in full detail in this connection sets forth the nature and extent of the public use which it is carrying on in said State of Utah. It is unnecessary here to reiterate such allegations, but it is sufficient to say that the amended answer shows without dispute the existence and the necessity for the continuance of a very large, substantial and necessarily continuous public use within the State of Utah, and a use which the State itself would have the undoubted right to compel to be continued by such necessary legal procedure or process as the State might desire to avail itself of if the appellant, or others acting through or against it should attempt to interfere with or destroy such essential public use. (Trans. pp. 23 and 24.)

In a further separate answer the creation of the State of Utah and certain acts of the Legislature of the Territory of Utah, approved by the Governor, and either approved of or acquiesced in by the Congress of the United States, are set forth. These matters we regard as of important legal significance, but as they are succinctly set forth in the answer it would not aid the court to repeat the same here. (Trans. pp. 24-30 inc.)



Particular attention, however, is called to an act of the legislature of Utah, April 5, 1896, entitled,

"An Act to Encourage the Irrigation of Land and the Mining, Milling, Smelting and other Reduction of Ores, and the use and application of the Unappropriated Waters of Natural Streams and Water Courses to the Generation of Electrical Force and Energy, and to provide for the exercise of the right of Eminent Domain therefor,"

and also to the act of the legislature of the State of Utah, approved March 11, 1897, with respect to rights of way for the appropriation and beneficial use of water. (Trans. pp. 26 and 27.)

The legislation referred to shows the intention of said state to recognize and confirm the right of its agencies and citizens to acquire the use of privately-owned or publicly-owned lands, and right of way over the same wherever necessary, for the development and beneficial use of water.

It is also averred that originally all of the land of said State and Territory was, and about ninety per cent thereof still is public land of the United States, and that it has always been the custom and practice within said state to freely occupy and use the public lands, wherever necessary for the development of the beneficial use of water, consistent with the Act of July 26, 1866, and other acts consistent therewith and supplemental thereto, and that no officer or other representative of the United States

has until some time in 1909, questioned any such rights to the use of water or to any such right of way over the lands of the United States, etc. (Trans. p. 27.)

Reference is also made to the acquisition of the territory of Utah and other territories by the treaty with the Republic of Mexico, and the agreement that the territory acquired was to be admitted as states of the Union, and the inhabitants thereof,

“to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution of the United States,” etc. (Trans. pp. 27 and 28.)

Reference is also made to the “Enabling Act,” and to the admission of Utah as a state, and to the legislation of Congress affecting the uses of the public land, and there are also set out the circumstances attending the usurpation and attempted exercise of municipal power by the United States within the State of Utah, not under the authority of but contrary to the Constitution of the United States. All of which matters are fully set forth and need not be herein quoted. (Trans. pp. 28, 29, and 30.)

In the concluding portions of the amended answer the claims and contentions of the appellant are set forth in sufficient detail and reference thereto is made. (Trans. pp. 30 and 31.)

Inasmuch as the departmental rules, regulations and permit agreements and the forms thereof are set forth in

the answer, and an understanding and consideration of the same are necessary to a decision of this case, it will be appropriate here to conclude this statement of facts by reference to these rules, regulations and permit agreements.

In this connection reference is made to the requirements embodied in the regulations of the Secretary of Agriculture, adopted and approved the 24th day of February, 1913, (Trans. pp. 60-134) under and assumed to be authorized by the Act of February 15, 1901.

We will later discuss this Act and certain very important considerations affecting the constitutionality of the same, especially with reference to its departmental construction and as to whether or not these rules and regulations, at least as to many of them, are authorized or permitted by this Act of Congress.

Our present purpose, however, is only to indicate and point out the more essential and important portions of these rules and regulations and the more important, and, as we think, unwarranted, assumptions of authority under the Act of 1901.

Without here pausing to consider the Act of 1901, or the constitutionality or general interpretation of the same, it may be pointed out that it contains not even the slightest intimation on the part of Congress of any intention to impose, or to confer any authority upon any one

to impose, any charge whatever in connection with rights of way for the appropriation or beneficial use of water for any purpose. Nor does it indicate, or authorize, any conditions, rules or regulations, except such as are consistent with and which may be adopted for the purpose of carrying the Act into effect and not as conditions that will prevent, retard or interfere with or place burdens upon the enjoyment of the rights therein proposed to be allowed to be exercised.

It will also be observed that the clause to the effect that the permission given may be revoked and shall not be held to confer any right or easement or interest in, to or over any public lands, reservation or park, is so construed that all developments and water appropriations made under the said Act or permits issued thereunder, no matter how permanent the same may be, nor how great the expenditures may be, nor how important the water rights acquired thereunder may be, nor how indispensable the necessary public uses within a State may be, are to remain subject to termination and revocation, at the will of the departmental authority.

And we here point out that these permits are proposed to be granted under the assumption that no permanent rights can be acquired, and assuming that they may be revoked at any time, and they are in any event to terminate at the expiration of fifty years, subject to notice

of application for, and the Secretary's discretionary right to allow renewal as the terminating period approaches.

This involves the sufficiently important assertion of a right in the Federal Government and in the departmental head to destroy a water right and terminate a public use upon any desired date, no matter how great the investment nor how essential the public use, and also the establishment of a definite period of limitation after which the Secretary in effect gives notice that he will or will not renew the privilege and permit the further appropriation of the water and the carrying on of a public use, as he or his successors may determine.

Regulation L-4 reads in part as follows:

"Final permits will be issued only in case it appears that the proposed occupancy and use will be in general accord with the most beneficial utilization of the resources involved and consistent with the public interest." (Trans. p. 66.)

It is important here to observe that the matter under consideration is the appropriation of water and the development of water rights under the State laws, to which the right of way is incidental, but indispensably necessary. Nevertheless, the Secretary reserves to himself discretion to determine not only as to whether or not the water right is being properly utilized, but whether the development is "consistent with the public interest." As these questions will be briefly discussed under one heading later, we will

not here indulge in a discussion of his authority so to do.

By regulation L-5 the Department recognizes that the right to the water and the water appropriation is to be acquired under State laws, and it is set forth that generally litigation over water rights will not be accepted as a sufficient reason for granting an extension. It will thus be observed that although the appropriator of water might be enjoined and prevented for a time, under State laws, from proceeding with his appropriation, nevertheless the rights of way essential to such appropriation might lapse and become unavailable.

The regulation also recognizes the authority of the State, and provides that wherever the approval of a local administrative board is necessary, certified evidence of such approval must be presented to the Department. (Trans. pp. 66 and 67.)

Regulation L-6 provides that

“unless sooner revoked by the Secretary, a final power permit shall terminate at the expiration of fifty years from the date of the permit.”

With the provision following that within certain time limitations a renewal may be applied for, but as to whether or not it would be granted is apparently left as a discretionary matter with the Secretary. (Trans. p. 67.)

The regulations also provide for the issuance of permits upon different terms and under different conditions

for "municipal purposes," which subject will also be discussed later.

Subject to certain definitions and deductions it is provided that except for permits to municipal corporations for municipal purposes, or for irrigation, or for temporary construction, certain charges shall be imposed based upon the assumed "rental capacity of the power site," the rate per horse power being established commencing at ten cents per horse power for the first year, and subject to an increase of ten cents per horse power for ten years, at which rate it is to continue, subject to the consideration that since the permit may upon any date be revoked by the Secretary, the rate might upon any date be increased to any desired figure. (Tran. pp. 68 and 69.)

There are numerous other provisions and exceptions as to charges, to which no reference need here be made.

A provision is carried in that if default shall be made for sixty days in payment of the rental charge, all rights shall terminate and the permit will be formally revoked. (Trans. p. 70.)

Provision is carried in for the imposition of new rental rates at the end of the first ten year period, provided that such increased rates shall not so far affect the income of the corporation as to make the income unreasonably small; all of which questions are to be determined, it will be noted, by the Secretary in charge. And since the

whole project and property and public service is assumed to rest on his unrestrained discretion, his conclusions in such a connection, if the regulations are lawful, would be subject to no control by any state authority, or any other authority, for that matter. In fact, this is carefully and affirmatively stated in the following language:

"The decision of the Secretary shall be final as to all matters of fact upon which the calculation of the capacities of rentals depends." (Trans. p. 70.)

And since the rates paid by the public within a State would necessarily depend proportionately upon the amount of the charge imposed by the Secretary, the people of the State within which such a permitted project was situated would be subjected to the liability and duty of paying the exact equivalent of an excise tax through said public service corporation, which tax or charge is not imposed upon any other similarly situated industry in the United States.

It is provided—Regulation L-13 (Trans. p. 76) that before receiving a permit the permittee shall file a stipulation binding the applicant to all the conditions referred to.

By regulation L-14, referring only to certain portions thereof, the permittee is required to construct the project according to plans and specifications submitted in advance; to begin the construction within a specified time, and thereafter to diligently and continuously prosecute such con-



struction, etc.; to complete the construction and begin operation within a specified period; to operate the project continuously; to pay annually in advance such rental charges as may be fixed and required by the Secretary, and various other burdensome requirements.

It should here be noted that these matters relate to the appropriation and acquisition of a water right under State laws, and the requirements may be consistent with or entirely in conflict with the State laws on the same subject. And so far as operation is concerned, the state laws and requirements fully cover the necessity wherever the service being performed is a public service.

The installation of meters, measuring-gauges, et cetera, is required, and the books and records of the permittee are to be subject and open at all times to the inspection of the officers of the United States, and certain prescribed systems of accounting are to be adopted and carried out, provided that if the laws of the State in which the power business is transacted require periodical reports for public utility corporations, copies of such reports will be accepted as fulfilling these requirements. The permittee is required to abide by reasonable regulations of the service rendered and as to whether these regulations are to come from the State or the Nation we are not told, but if rates of payment are prescribed by the State the permittee must abide by the same. (Trans. pp. 77 and 78.)

Perhaps the most wholly gratuitous and unwarranted assumption of governmental power and the most hurtful, is contained in Subdivision S of Regulation L-14, (Trans. pp. 78, 79, and 80), which requires of the permittee the surrender of the permit to the United States, or the transfer of the same to such State or municipal corporation as the Secretary may designate, and on the conditions prescribed in the paragraph, also to give, grant, and transfer with the permit upon such demand and upon such conditions all works, etc., then owned or held by the permittee or then valuable or serviceable in the generation and transmission of electricity or other power, or then dependent in whole or in part for their usefulness upon the continuance of the permit, together with all interests in all leaseholds or operating property used in connection with the works under permit, and all contracts for the sale and delivery of electrical or other power. The Secretary may require such surrender if the United States shall desire to take over the permit and the property, but whenever a substantial part of such property is situated elsewhere than on National Forest Lands, he may designate as such transferee any State or municipal corporation which shall desire such transfer with certain provisos affecting municipal corporations requiring their acquisition of such property not on National Forest Lands, or the adjudication of their right to so acquire such property by eminent domain.

The designated transfer shall be made on the condition that the United States as such transferee shall pay to the permittee the reasonable value of all such works, etc., and in addition thereto a bonus of three-fourths of one per cent of such reasonable value for each full year of the unexpired term of the permit. Also that such reasonable value shall not include any sum for any permit, franchise or right granted by the United States, by any State or by any municipal corporation, in excess of the amount actually paid therefor, nor any sum for any other intangible properties or values whatever, it being the understanding that the bonus shall be in substitution for such so-called intangible values.

Certain methods are presented relative to agreement upon valuation or arbitration in connection therewith, and any estimate of value upon the permit to the lands occupied in connection therewith is excluded.

Subdivision U of said Regulation L-14 is a rather brief but quite comprehensive enactment in prohibition of combinations and trusts or organizations in restraint of trade with foreign nations or between two or more States, "*or within any one State*" in the generation or distribution of electrical energy or power. (Trans. pp. 79 and 80.)

By Regulation L-17, final permits may be transferred to a new permittee under the regulations and conditions stated "*and not otherwise.*" (Trans. p. 81.)

The regulations conclude by calling attention to the provision of law which assumes that all power to either proceed or continue, or to cease operation, or to compel or permit the same, is vested in the Secretary, nevertheless the Secretary says he will not revoke such permit (unless he changes his mind), until after the permittee shall have had a reasonable time (not to exceed ninety days) within which to show cause why such revocation shall not be made.

By the decree in this case it is provided as follows:

"That the defendant, The Beaver River Power Company, a corporation, its officers, agents, servants, employees, successors and assigns are hereby enjoined and restrained from maintaining and operating its power house, reservoir, pipe lines, or conduits, telephone lines, transmission lines, dwelling houses, blacksmith's shop, workshop, stable and wagon shed, and other outbuildings now located upon the following described lands, the property of the United States, to wit: (Here follows description.)"

\* \* \* "That the plaintiff be and is hereby decreed and adjudged to be the true and lawful owner of the said lands hereinabove described, and every part and parcel thereof, and its title thereto is adjudged and decreed to be quieted and confirmed as against all claims, demands and contentions whatsoever of the defendant." (Trans. p. 135.)

This decree, it will be perceived, sustains absolutely all of the appellee's contentions and in effect holds that the United States has the unrestrained right to permit or re-

fuse the use of its vacant and unoccupied lands even for uses most essential to the welfare of the people of the State wherein such land may be situated, and that it may attach any conditions to its grant of the right to use such lands wholly regardless of what such conditions may be and what Governmental powers of regulation and control are thereby sought to be exercised by the United States and its executive officers within the State.

#### RECAPITULATION AS TO THE FACTS.

The situation may be summarized that it is admitted upon the record and the facts and circumstances are without dispute, that with the acquiescence and consent of the Government, and partially before and partially after the creation of the forest reserve the appellant and its predecessors acquired by appropriation certain vested water rights and developed and applied these water rights to the beneficial use and purpose of the development of the hydro-electric plant and power in question, and that such water rights were fully acquired, and the lands necessary thereto, and to the utilization of the same were, with the full acquiescence and consent of the Government and its officers, subjected to the use and purposes for which they are now used. Under such circumstances the investments and developments described in the complaint were made, an essential public service industry established, and a connected

and extensive public use for the supplying of hydro-electric power for all ordinary public uses and purposes, including the lighting of cities and municipalities, the operation of machinery, the carrying on of industry, and all of the other essential uses of a public nature to which such energy can be applied, fully accomplished, carried out and completed, prior to the institution of this action.

In this case there is no question presented of wrongful or wilful trespass, or as to whether or not any official requirements or regulations should have been complied with. The sole question is as to whether or not appellant, having in compliance with the laws of the State and subject to its mandate and as one of its agencies and public utilities, acquired and applied certain water rights to beneficial uses and inaugurated and established an essential public service, can have its rights of way and therewith its vested water rights and other properties forfeited to the Federal Government; and as to whether or not, beyond the control of either the appellant or the State, the United States Government is in a position thus to destroy water rights and rights of way vested with its approval and consent, and to suppress and enjoin the further continuance of an essential public service required by the public necessity to be continuously operated, and which the State, in all other instances, would have the undoubted authority, re-

gardless of any objection from any property owner, to compel to be continued for the benefit of its people.

**SPECIFICATION STATING IN WHAT THE DECREE  
IS ALLEGED TO BE ERRONEOUS.**

(Transcript, pages 136-141.)

The Court erred in sustaining appellee's motion to strike the amended answer of appellant, and in granting an injunction herein, and in rendering the decree herein:

**I.**

Because, in sustaining said motion and granting the injunction and in entering said decree herein, the Court held that the defendant and its predecessors in interest did not have and had not acquired, by virtue of the facts admitted by the record herein, vested and accrued rights to the use of the waters of Puffer Lake and the South Fork of the Beaver River, and the incidental and necessary rights of way over the land of the plaintiff within the State of Utah, under the laws of the State of Utah and of the United States, including the right to change the place of use and the purpose for which said water might be used.

**II.**

Because, in sustaining said motion and granting said injunction and in entering said decree, the Court held that the defendant and its predecessors in interest did not have and had not acquired vested and accrued rights in and

to the waters of the Beaver River within the State of Utah, with the right to appropriate and use the incidental and indispensable easements over the lands of plaintiff upon their giving notice of their intention to appropriate said waters, and by commencing work designed to effect such appropriation, as set forth in defendant's answer.

### III.

Because, in sustaining said motion and granting said injunction, and in entering said decree herein, the Court held that the withdrawal of said lands from sale and entry deprives defendant of its right to complete said work, and that the continuance and completion of said work and the operation of said hydro-electric plant, although begun and carried on in good faith and in compliance with the laws of the State of Utah, constitutes a trespass and a purpresture upon the lands of the plaintiff described in its bill of complaint.

### IV.

Because, in sustaining said motion and granting said injunction and in entering said decree, the Court held that the laws of the State of Utah governing the appropriation and beneficial use of water, set forth in defendant's answer, are, with relation to the lands of the United States, in effect null and void for the assumed reason that they are in conflict with the Constitution of the United States,



and particularly with Clause 2, Section 3, of Article IV thereof, whereas no such conflict exists.

V.

Because, in sustaining said motion and in granting said injunction and in entering said decree, the Court held that under said clause of the Constitution of the United States, the plaintiff has governmental powers over the appropriation and use of water and the electrical power generated therewith and the business conducted in connection with the same within the State of Utah which it does not have in other States of the Union in which there are no public lands, the effect of such holding being to deprive such State of Utah of her police power over the waters within her borders, and industries and business conducted wholly within the said State and such holding is in violation of the Constitution of the United States and the Tenth Amendment thereof, and it deprives said State of Utah of her constitutional equality with the original States of the Union.

VI.

Because, in sustaining said motion and in granting said injunction and in entering said decree, the Court held that the Acts of Congress of May 14th, 1896 (29 Stat. 120) and February 15th, 1901 (31 Stat. 790) repealed or superseded Section 2339 of the Revised Statutes of the

United States, with respect to rights of way over public land for the use of water for the purpose of generating and transmitting electric power, whereas such construction of said Act is not in accordance with the intention of Congress in passing the same and the said Section was not by said Acts or either thereof repealed or superseded, and such construction is contrary to the Constitution of the United States in that it deprives the State of Utah of its police powers over the appropriation and beneficial use of water, in violation of the provisions of said Constitution of the United States and of the Tenth Amendment thereof, and in that it deprives the defendant of vested and accrued rights to the use of said waters, as well as the incidental and necessary easements over the public lands, without due process of law in violation of the Fifth Amendment of the Constitution of the United States of America, and in that it arrogates to the United States of America governmental powers over the appropriation and beneficial use of waters and of a business and industry conducted wholly within the State of Utah, and control and regulation of enterprises and industries therein which are dependent upon the beneficial use of water, and which require easements traversing public lands, which powers are not granted by but which are asserted contrary to the provisions of the Constitution of the United States.

## VII.

Because, in sustaining said motion and in granting said injunction and in entering said decree, the Court held that the defendant and its predecessors in interest had no right under the facts admitted by the record in this cause to appropriate necessary easements over the public land in connection with the appropriation and beneficial use of water within the State of Utah, and in compliance with its laws without first obtaining the express permission of the Secretary of the Interior if such land was not reserved, or of the Secretary of Agriculture if such land was included in a forest reserve.

## VIII.

Because, in sustaining said motion and in granting said injunction and in entering said decree, the Court held that the United States of America, the plaintiff herein, was entitled to an injunction restraining, preventing and destroying a public use within the State of Utah, which is authorized by the eminent domain statutes of such State, whereas any other proprietor of land would be limited in such case to an action for damages.

## IX.

Because, in sustaining said motion and in granting said injunction and in entering said decree, the Court held that the plaintiff was not estopped by its conduct, under the facts admitted by the record in this case, to deny that

the defendant had a vested right in the easements over said land described in plaintiff's bill of complaint, for the operation and maintenance of said hydro-electric plant of defendant.

X.

Because no grounds for equitable relief are stated in plaintiff's bill of complaint, and the motion of defendant to strike said bill of complaint should have been sustained and said bill of complaint should have been dismissed for want of equity.

XI.

Because the Court erred in sustaining said motion and in granting said injunction and in entering said decree for the reason that the regulations of the Department of the Interior and of the Department of Agriculture respecting rights of way over public lands within the State of Utah for the use of water for the purpose of generating and transmitting electric energy, compliance with which regulations by the defendant it is one of the purposes of this action to enforce, are unauthorized by any legislation of Congress, are unreasonable, are contrary to and in violation of the laws of Congress, and are unconstitutional, null and void, for the further reason that said regulations assume for the United States governmental powers which are not granted to it by the Constitution, over the appropriation and use of waters for any purpose

or in any connection except in connection with navigation; for the further reason that they deprive the State of Utah of its police powers of control over the appropriation and beneficial use of water within said State, in violation of the Constitution of the United States and the Tenth Amendment thereof; for the further reason that said regulations deprive the defendant of vested and accrued rights to the use of water without due process of law in violation of the Fifth Amendment of the Constitution of the United States, and for the reason that they impose a tax and excise upon the business and operations of the defendant, which tax or excise is not uniform throughout the United States, is not authorized by Congress and is in violation of Clause 1, Section 8, Article 1 of the Constitution of the United States.

## XII.

Because, in sustaining said motion and in granting said injunction and in entering said decree, the Court held that notwithstanding it was alleged and admitted that the said waters had been appropriated and the right thereto had vested and accrued under the laws of the State of Utah, and the rights of way over the public lands described in the complaint had been used and appropriated and were indispensable in connection therewith, and that electric power was being generated, sold and dis-

tributed within the State for public uses and purposes which were indispensably necessary to the industries of said State and to the inhabitants thereof, and which said State could compel to be continued for the benefit of the inhabitants of said State, that, nevertheless, the plaintiff had the right and power to eject the defendants from said rights of way and the use thereof and prevent the appropriation of such water, and take away and destroy the right thereto, and to prevent and prohibit the carrying on of the said public-service industry within said State and to deprive the citizens and inhabitants of said State thereof, although they are entitled to such services and to be protected in the same by said State of Utah and under its laws.

### XIII.

Because, in sustaining said motion and in granting said injunction and in entering said decree, the Court held that by the creation and establishment of such forest reserves within the said State pursuant to executive order by the President of the United States, the said State of Utah and its inhabitants had been deprived of all right under the laws of the United States in connection with the appropriation and beneficial use of water within such forest reserves and the rights of way necessary and incident thereto, although, by the laws of Congress, it is expressly provided and intended that the said forest reserves

may be entered upon for all lawful purposes, including the purpose and the right to appropriate and make beneficial use of the waters therein for all lawful and beneficial purposes under and in accordance with the laws of said State of Utah.

#### XIV.

Because, in sustaining said motion and in granting said injunction and in entering said decree, the Court erred for the reason that no injury or damage accrued or could accrue to the United States of America by reason of the acts complained of, and because its right, if any, on account of any such injury or damage is waived by the Ninth Section of the Act of Congress of July 26th, 1866, Section 2339 Revised Statutes of the United States, and because prior to and under Sections 2339 and 2340 of the United States, it has always been the practice of the United States of America to dispose of its lands subject to vested and accrued rights to the use of water and easements connected therewith, without making any deduction in the price of acreage of such lands on account of the existence of the right to use such water and easements.

#### XV.

Because the Court erred in sustaining said motion and in granting said injunction and in entering said decree, for the reason that the amended answer of the defendant and appellant herein, and each separate defense therein

stated, constitutes in law and in equity a defense and defenses to the bill of complaint herein.

#### XVI.

Because, in sustaining said motion and in granting said injunction and in entering said decree, the Court erred for the reason that by Sections 2339 and 2340 of the Revised Statutes of the United States the existence and validity of local customs, laws and decisions of the Court governing the appropriations of water are recognized and confirmed and said Section 2339 declares that the possessors and owners of such vested rights to the use of water and the rights of way therefor for mining, agricultural, manufacturing and other purposes shall be maintained and protected in the same, and that said Section 2339 has not been repealed or modified by any subsequent legislation of Congress and said Section is in effect a recognition by Congress of the right of the States to control the appropriation and use of water for all purposes except navigation, and that the title of the United States to its public lands is held in subordination to such right.

#### XVII.

Because, in sustaining said motion and in granting said injunction and in entering said decree, the Court erred for the reason that said bill of complaint should have been dismissed for want of jurisdiction, because the



State of Utah is a necessary and indispensable party to said action.

### ARGUMENT AND AUTHORITIES.

It appears to us that the great questions involved in this case can best be presented by disregarding in the first instance the detailed or incidental questions of right, and considering the questions of constitutional law and constitutional right which we regard as controlling in the case, before discussing any matter of detail or Act of Congress or question of control over reserves or the like, which we shall be obliged to present and consider in the concluding portions of this brief.

We shall, therefore, as suggested, first present the fundamental and constitutional questions, and in order that the authorities later cited and the arguments later made may be considered with relation to the precise matters desired to be illustrated and understood, we will make the following suggestions as propositions of law practically undisputed under our system of government.

1st: The powers, duties and functions of the Federal Government are enumerated in the Constitution, and all authority for the imposition of charges and the regulation of industries or business, or the exercise of governmental power within any State must be found in the Constitution, and no such power or authority is attendant upon or can

be derived from its control over or its proprietorship of the public lands.

2nd: The Constitution of the United States, and all laws of Congress, must be so construed as to operate uniformly in all the States, including the original thirteen, and every one of the States since admitted, and no act of admission of any State can be so construed as to change this rule of uniformity.

3rd: The Federal Government may make rules and regulations for the protection of its proprietary interest in the public lands, and for the disposition thereof, but this right conveys and implies no sovereign power, or power to interfere with the development of the resources of the State, the construction of roads, canals, and the like, or to impose unequal or unusual excise charges in any such State, or assume therein any police power or regulation, or authority over any of the inhabitants thereof, or the industries therein that it might not exercise under its constitutional grant of powers independently of any public lands.

4th: The State, subject to the control over the navigable waters for the protection of commerce between the States by the Federal Government, controls the water flowing in navigable and non-navigable streams, and all rights to such water or the beneficial use thereof is and must be acquired from the State and under State laws,

and the use of such water and the supply thereof, and charges therefor, are fully subject to the authority and control of the State, and the Federal Government has no authority over or control of the use of such water, or the business conducted in connection therewith.

5th: The State and its agents and citizens and corporations, incorporated for that purpose, not only have the right to the use of necessary rights of way over the public lands for the appropriation and beneficial use of water, and these rights have not only existed (along with the right to roads and all other necessary means of communication) since the foundation of the Government, but the same have been so recognized not only by such custom but also by acts of Congress, which acts, however, have been construed not as granting the rights but as merely a recognition of a pre-existing right arising out of the very nature of the Act of Cession and the constitutional relations between the Federal Government and the several states.

6th: The rules and regulations of the Federal Government with respect to navigable waters and public lands (including laws for the regulation of commerce between the States) may be fully adequate for all such purposes. And such rules and regulations concerning the public lands may and should fully protect the Government's interest therein as proprietor thereof, but its right

to the ultimate disposition of the same must nevertheless be construed and enforced with due regard and in subordination to the pre-existing and constitutionally guaranteed right of the State to provide for the full development of all of the resources of the State, to provide and keep open all necessary means of travel and communication in the State, including roads and railroads, canals for commerce and the beneficial use of water and all public ways and means for the use of the people of the State, and so that each State, not by favor of the Federal Government, but as a guaranteed matter of constitutional right, may be as free from exceptional taxes and charges as any other State regardless of the existence or non-existence of public lands.

Since the question of the authority to make rules and the force and effect of the rules promulgated by the executive branch of the Government will be found to be of great significance in the course of the discussion, we here further call the attention of the court to the consideration that the question of the acquisition of public lands by, and the control and authority of the Federal Government over, such lands is separate and distinct in the Constitution from all other constitutional or governmental questions.

Not here to dwell upon the subject, it is important to point out that the proprietorship, acquisition and control

of the public lands was not a part of, but incidental to, the formation of the Federal Government. For a time it appeared that the States would insist upon retaining their public lands. Other States, not having such lands, however, raised the earnest contention that the general welfare and the necessary equality of the States required that the public lands, that is to say, the State lands, should be ceded to the Federal Government. This important phase of the formation of our Government was almost entirely lost to popular history for the reason that upon a settlement of the controversies the Federal Government proceeded, and for more than a hundred years continued, such an extremely liberal policy with respect to the public lands and toward the States in connection therewith that all questions of their disposition, and of the historical importance of this subject in connection with the inception of our Government was practically lost sight of.

For instance, Virginia claimed the Northwest Territory and was naturally averse to surrendering the valuable property and prestige and power that would have gone with the continued ownership of this territory. Of the States participating in the negotiations Virginia was the leading factor on the part of those States having large areas of public lands, and notwithstanding its many other contributions to the formation of our great scheme of

government, perhaps, if it had been historically preserved the greatest honor of that State would be attached to the broad statesmanship involved in the settlement of this question. Virginia was represented by no less great statesmen than Jefferson, Madison, Lee and others, and finally the cession was agreed to and made upon the proposition and understanding that the territory so ceded to the United States by Virginia and the other States having public lands, should be administered and disposed of to pay the revolutionary war debt and as rapidly as could reasonably be done passed to private proprietorship, and that States should be created over and out of the property so ceded to the Federal Government, which should be equal States of the Union in all respects whatsoever with the others. This great concession to the Federal Government was made by Virginia and the other States similarly situated, and the final obstacle to the adoption of the Articles of Confederation, and following these Articles the adoption of the Constitution and the formation of a perfect Union was removed.

When all the other details had been agreed upon the remaining vital consideration was by whom should the public trust thus delegated to the United States be administered, and finally, and not as a mere incident but because all of the States, as well as all of the people of the United States were, and must continue to be

represented in the Senate and in the House, the subject matter of the public lands in its entirety was delegated to the Congress. The provision of the Constitution thus adopted and the only one relating to the subject of the public lands is Paragraph Two of Section 3, Article IV, reading:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, *or of any particular State.*"

Thus was established the rule that no other branch of the Government except the Congress or the Executive acting under its authority express or implied should have any power or authority over the public lands. It is, therefore, fundamental and interesting to consider throughout the discussion that the executive branch of the Government has no constitutional or inherent powers whatsoever over the public lands, but all and every part of executive authority attempted to be exercised with respect thereto must be derived through and found in the express or implied authorization of Acts of Congress. And no such express or implied authority conferring any power on the Executive is even claimed with relation to any question of general governmental matters, but only, if at all, with relation to the use and disposition of the public lands.

While neither this branch of the subject precisely as stated nor the closing provisions of Article IV referred to have been much discussed in this precise light, herein we think can be found the fundamental reasons for the earlier and lucid decisions and conclusions arrived at by this Court on this subject. Clause 2 of Section 3 of Article IV is not found in either the legislative or executive divisions of the Constitution but under the division relating to the States. This was doubtless in recognition of their great concession to the Federal Government as shown by the clause as follows:

"and nothing in this Constitution shall be so construed as to prejudice any claims of the United States *or of any particular State.*"

It will thus be seen that to have held that an inequality of right and opportunity between the States existed, dependent upon whether or not the Federal Government was the owner of lands therein, would have had the effect to do express violence to the definite concluding clause of the article above quoted.

With these fundamental considerations in mind we now proceed to a consideration and presentation of the earlier, as well as some of the later, decisions of this Court with respect to the vastly important subject of the relations of the Federal Government and of the several States to each other on account of the ownership of the public lands by the Federal Government. It will be



observed that some of the opinions quoted and other of the earlier opinions therein referred to were written by Marshall himself, or concurred in by him, although he is universally recognized as the great exponent of Federal power, in so far as that power is justly deducible from a broad and just interpretation of the Constitution. But the rights of the several States were so thoroughly grounded in equity and justice, and the controlling consideration and necessity for their exact and unvarying equality of right, power and opportunity was so obvious that the great judges occupying the Supreme Bench of the country at that time were clear and forceful in their enunciation of the rules to which we now propose to refer.

While there were other earlier cases to the same effect, this subject was first taken up and definitely decided in the case of *Pollard's Lessee v. Hagan*, 3 How. 212, and it is interesting to note that in the early history of the country the controversies related almost solely to the question of control over navigable waters or the lands covered thereby, doubtless for the reason that there never was any delegation of municipal authority to the Federal Government or constitutional grant of power whatsoever in connection with the public lands as such; but it was vigorously contended that, in connection with the constitutional grant of power to control commerce

between the States, including the protection of navigable waters, certain authority of a municipal nature over the submerged lands had been vested in the Government, and it was in settling these controversies that the Courts had occasion to enunciate the rules upon which to rely. It remained for late explorers and inventors of constitutional innovations to suggest that powers of a municipal nature and equivalent to power delegated by the Constitution were derived in connection with its proprietorship of the public lands.

We shall now proceed to cite, and for the purposes of illustration to quote from at some length, the most important and controlling decisions of this Court on this subject.

*Pollard's Lessee v. Hagan*, 3 How. 212:

"And we now enter into its examination with a just sense of its great importance to all the States of the Union, and particularly to the new ones. Although this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the Government of the Union, and the State governments, over the subject in controversy, many of the principles which enter into and form the elements of the question have been settled by previous well-considered decisions of this Court, to which we shall have occasion to refer in the course of this investigation." (P. 218.)

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"We think a proper examination of this subject will show that the United States never held any

municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new States were formed, except for temporary purposes, and to execute the trusts created by the Act of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic, of the 30th of April, 1803, ceding Louisiana." (P. 219.)

\* \* \* \* \*

"When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms in the agreement, but the public lands. *And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted.*"

"By the sixteenth clause of the 8th section of the first article of the Constitution, power is given to Congress 'to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by

the consent of the legislature of the State in which the same may be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.' Within the District of Columbia and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government, of every description, are united in the Government of the Union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists. The right of Alabama, and every other new State, to exercise all the powers of government which belong to, and may be exercised by the original States of the Union, must be admitted and remain unquestioned, except so far as they are temporarily deprived of control over the public lands.

"We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of the old States, of their waste and unappropriated lands, to the United States under a resolution of the old Congress, of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt, incurred by the war of the Revolution. The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt, and to erect new States over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.

"Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new States will be complete, throughout their re-

spective borders, and they and the original States will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new States by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new States, for that particular purpose. *The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a State.* Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession. The argument, so much relied on by the counsel for the plaintiff, that the agreement of the people inhabiting the new States, that they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States, cannot operate as a contract between the parties, but is binding as a law. Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation." (P. 223.)

\* \* \* \* \*

"The propositions submitted to the people of the Alabama territory, for their acceptance or rejection, by the Act of Congress authorizing them to form a Constitution and State government for themselves, so far as they related to the public lands within that territory, amounted to nothing more or less than rules and regulations respecting the sales and disposition of the public lands." (P. 223.)

\* \* \* \* \*

"If, in the exercise of this power, Congress can impose the same restrictions upon the original States, in relation to their navigable waters, as are imposed by this article of the compact on the State of Alabama then this article is a mere regulation of commerce among the several States, according to the Constitution, and, therefore, as binding on the other States as Alabama." (P. 229.)

\* \* \* \* \*

"By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Third. The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case. The judgment of the Supreme Court of the State of Alabama is, therefore, affirmed." (P. 229.)

We have quoted quite liberally from this case because in *principle* it decides nearly everything we contend for and has been frequently cited and affirmed. The Supreme Court bench was most eminent at this time and all of the judges concurred except Judge Catron, who, in dissenting from some of the views of his associates, used this language (p. 233):

"I have expressed these views in addition to those formerly given, because this is deemed the most important controversy ever brought before this Court,

either as respects the amount of property involved, or the principles on which the present judgment proceeds—principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores.”

*Veazie v. Moor*, 14 How. 568, considering the claimed control of the United States over commerce on the Penobscot River, in Maine, the Court said (pp. 572, 573) :

“Such a pretension would effectually prevent or paralyze every effort at internal improvement by the several States; for it cannot be supposed that the States would exhaust their capital and their credit in the construction of turnpikes, canals, and railroads, the remuneration derivable from which, and all control over which might be immediately wrested from them, because such public works would be facilities for a commerce which, whilst availing itself of those facilities, was unquestionably internal, although intermediately or ultimately it might become foreign.

“The rule here given with respect to the regulation of foreign commerce, equally excludes from the regulation of commerce between the States and the Indian tribes, the control over turnpikes, canals, or railroads, or the clearing and deepening of water courses exclusively within the States, or the management of the transportation upon and by means of such improvements. In truth, the power vested in Congress by Article I, Section 8 of the Constitution, was not designed to operate upon matters like those embraced in the statute of the State of Maine, and which are essentially local in their nature and extent. *The design and object of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious*



*distinctions, which local jealousies, or local and partial interests might be disposed to introduce and maintain.*

"These were the views pressed upon the public attention by the advocates for the adoption of the Constitution and in accordance therewith have been the expositions of this instrument propounded by this Court, in decisions quoted by counsel on either side of this cause, though differently applied by them. *Vide the Federalist*, Nos. 7 and 11, and the cases of *Gibbons v. Ogden*, 9 Wheat. 1; *New York v. Miln*, 11 Pet. 102; *Brown v. The State of Maryland*, 12 Wheat. 419; and the *License Cases* in 5 How. 504."

*Withers v. Buckley*, 20 How. 84. This in principle, and in all respects, is one of the important cases in the books. Its significance can only be realized by careful reading. We therefore quote at some length as follows (pp. 92, 93):

"In considering this Act of Congress of March 1st, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the the Confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the Confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this Court in the case of *Pollard's Lessee v. Hagan*, 3 How. p. 223. The Act of Congress of March 1st, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into this river,



could not have been designed to inhibit the power inseparable from every sovereign or efficient government, to devise and to execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the State, or might be productive of a change in the value of private property. Such consequences are not infrequently and indeed unavoidably incident to public and general measures highly promotive of and absolutely necessary to the public good. And here it may be asked, whether the law complained of, and the measures said to be in contemplation for its execution, are in reality in conflict with the Act of Congress of March 1st, 1817, with respect either to the letter or the spirit of the act? On this point may be cited the case of *Veazie et al v. Moor*, in 14 How. 568.

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"But, for argument, let it be conceded that this derelict channel of the Mississippi, called Old River, is in truth a navigable river leading or flowing into the Mississippi; it would by no means, follow that a diversion into the Buffalo bayou of waters, in whole or in part, which pass from Homochitto into Old River, would be a violation of the act of Congress of March 1st, 1817, in its letter or its spirit; or of any condition which Congress had power to impose on the admission of the new state.

"IT CANNOT BE IMPUTED TO CONGRESS THAT THEY EVER DESIGNED TO FORBID, OR TO WITHHOLD FROM THE STATE OF MISSISSIPPI, THE POWER OF IMPROVING THE INTERIOR OF THE STATE, BY MEANS EITHER OF ROADS OR CANALS, OR BY REGULATING THE RIVERS WITHIN ITS TERRITORIAL LIMIT, ALTHOUGH A PLAN OF IMPROVEMENT TO BE ADOPTED MIGHT EMBRACE OR AFFECT THE

COURSE OR THE FLOW OF RIVERS SITUATED WITHIN THE INTERIOR OF THE STATE.

"COULD SUCH AN INTENTION BE ASCRIBED TO CONGRESS, THE RIGHT TO ENFORCE IT MAY BE CONFIDENTLY DENIED, CLEARLY, CONGRESS COULD EXACT OF THE NEW STATE THE SURRENDER OF NO ATTRIBUTE INHERENT IN HER CHARACTER AS A SOVEREIGN INDEPENDENT STATE, OR INDISPENSABLE TO HER EQUALITY WITH HER SISTER STATES, NECESSARILY IMPLIED AND GUARANTEED BY THE VERY NATURE OF THE FEDERAL COMPACT. OBVIOUSLY, AND IT MAY BE SAID PRIMARILY, AMONG THE INCIDENTS OF THAT EQUALITY IS THE RIGHT TO MAKE IMPROVEMENTS IN THE RIVERS, WATER COURSES, AND HIGHWAYS, SITUATED WITHIN THE STATE."

We may here digress to suggest that if the position of the Government can be sustained it would not be at all difficult to "impute to Congress" the design to withhold from the public land States except as Executive Departments of the Government might permit, "The power of improving the interior of those States by means of either roads or canals."

*Escanaba Company v. Chicago*, 107 U. S. 678, 687:

"The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exercised are national in their character, and admit and require uniformity

of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non-action is therefore a declaration that they shall remain free from all regulation. *Welton v. State of Missouri*, 91 U. S. 275; *Henderson v. Mayor of New York*, 92 id. 259; *County of Mobile v. Kimball*, 102 id. 691.

\* \* \* \* \*

"Bridges over navigable streams, which are entirely within the limits of a State, are of the latter class. The local authority can better appreciate their necessity, and can better direct the manner in which they shall be used and regulated than a government at a distance. IT IS, THEREFORE, A MATTER OF GOOD SENSE AND PRACTICAL WISDOM TO LEAVE THEIR CONTROL AND MANAGEMENT WITH THE STATES, Congress having the power at all times to interfere and supersede their authority, whenever they act arbitrarily and to the injury of commerce."

\* \* \* \* \*

"On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. SHE WAS ADMITTED, AND COULD BE ADMITTED, ONLY ON THE SAME FOOTING WITH THEM. The language of the Act of admission is 'on an equal footing with the original States in all respects whatever.' 3 Stat. at L. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River. *Pollard's Lessee v. Hagan*, 3 How. 212; *Permoli v. First Municipality*, id. 589; *Strader v. Graham*, 10 id. 82."

In *Huse v. Glover*, 119 U. S. 543, the Court said, (pp. 548, 549) :

"The State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities, and thus augment its growth, it has full power. IT IS ONLY WHEN, IN THE JUDGMENT OF CONGRESS, ITS ACTION IS DEEMED TO ENROACH UPON THE NAVIGATION OF THE RIVER AS A MEANS OF INTERSTATE AND FOREIGN COMMERCE, THAT THAT BODY MAY INTERFERE AND CONTROL OR SUPERSEDE IT. If, in the opinion of the State, greater benefit would result to her commerce by the improvements made, than by leaving the river in its natural state—and on that point the State must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. The opening of a new highway, or the improvement of an old one, the building of a railroad, and many other works, in which the public is interested, may materially diminish business in certain quarters and increase it in others; yet, for the loss resulting the sufferers have no legal ground of complaint. How the highways of a State, whether on land or by water, shall be best improved for the public good is a matter for State determination, subject always to the right of Congress to interpose in the cases mentioned. *Spooner v. McConnell*, 1 McLean 337; *Kellogg v. Union Co.* 12 Conn. 7; *Thames Bank v. Lovell*, 18 Conn. 500; S. C. 46 Am. Dec. 332; *McReynolds v. Smallhouse*, 8 Bush. 447."

*Ward v. Race Horse*, 163 U. S. 504. The Court in this case holds that a treaty with the Indians was abrogated by

the act admitting Wyoming and that thereafter the Indians could not hunt on the public lands contrary to State laws.

The Court cites approvingly:

*Pollard v. Hagan*, supra;  
*Withers v. Buckley*, supra;  
*Escanaba Co. v. Chicago*, supra;  
*Cardwell v. American Bridge Co.* 113 U. S. 205;  
*Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1,

and follows such citations with this language (page 514);

"The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence."

We also pause here to point out that while this case might casually be assumed to be of less direct significance than some of the others, nevertheless when it is considered than some of the others, nevertheless, when it is considered self and his tribe to hunt upon the public lands was derived under a treaty made with his tribe before the admission of Wyoming and under express constitutional grant of

power to the Federal Government, it is of extreme significance that the controlling consideration with this Court was the preservation of the absolute equality of right of the State of Wyoming with all of the other States. Therefore, the treaty between the Federal Government and an Indian Tribe undoubtedly constitutional and valid when made and continuing so long as Wyoming remained a territory immediately ceased to be operative or effective when the imperative necessity of recognizing the equal municipal authority of Wyoming became involved. Certainly it is of no greater importance that the right to legislate with respect to the hunting of game shall be preserved in a state upon a parity and equality with the other States, than that it preserves its municipal power to develop the resources of the State, control the processes of eminent domain, regulate public utilities, and direct their management, service, disposition, value and acquisition by others, all of which we shall later show are taken away or impaired in Utah and other public land states if the contentions of the Government are sound.

*Sands v. Manistee River Improvement Co.*, 123 U. S. 288, 296;

"Yet from the very conditions on which the States formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. All the States thus formed were in the language of the resolutions or acts

of Congress, 'admitted into the Union on an equal footing with the original States *in all respects whatever.*' Michigan, on her admission, became, therefore, entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original States, and could at any time afterwards exercise full control over its navigable waters except as restrained by the Constitution of the United States and laws of Congress passed in pursuance thereof. *Permoli v. First Municipality of New Orleans*, 3 How. 589, 600; *Pollard v. Hagan*, 3 How. 212; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688; *Van Brocklin v. Tennessee*, 117 U. S. 151, 159; *Huse v. Glover*, 119 U. S. 544, 546."

(See also long line of federal cases cited in Rose's Notes to U. S. Reports, under *Pollard v. Hagan*.)

*United States v. Railroad Bridge Co.*, 6 McLean, 517; 27 Fed. Cases page 692, involved two questions, the obstruction of navigation and the use of public lands for a railroad bridge. This decision is, we think conclusive on principle, and is entirely consistent with the decisions of the Supreme Court of the United States on all points, we think, except the inference that in the absence of agreement the State could tax property of the United States which it is now held cannot be done. The case, however, in holding that a State may without the Government's consent, and against its objection, use the public lands, holds more than is involved in this discussion.

We are not discussing whether the United States, as proprietor, can insist upon its proprietary rights in con-



nection with the use of the public lands for purposes of roads and canals, etc. necessary to develop the State's resources. What we are contending for is that it, the United States, cannot assert any sovereignty or taxing powers, or police control in a State by virtue of its ownership of public lands, nor so assert its proprietorship as to destroy the right of and impede the State and its inhabitants in developing its resources by constructing all necessary roads, canals and means of communication. Nor can the federal government enjoin or destroy an industry or public service once established, nor impose any excise charges, fix any terms, or assert any sovereignty or police power in connection with or as a condition of permitting such use.

In holding that the federal government cannot at all refuse the use of the public lands for these necessary public charges, Judge McLean is sustained, we think, in principle by many of the decisions of this court, and by several adjudications which we cite to the effect that all such rights, by the very nature of the federal compact, must exist in the State and cannot be denied by the federal government. We quote from the opinion, 27 Fed. Cases, pages 692-3:

"Within the limits of a State Congress can, in regard to the disposition of the public lands, in their protection, make all needful rules and regulations.



But beyond this it can exercise no other acts of sovereignty which it may not exercise in common over the lands of individuals. A mode is provided for the cession of jurisdiction when the federal government purchases a site for a military post, a custom-house, and other public buildings; and if this mode be not pursued, the jurisdiction of the State over the ground purchased remains the same as before the purchase. This, I admit, is not a decided point, but I think the conclusion is maintainable, by the deductions of constitutional law.

\* \* \* \* \*

"But the important inquiry is, Whether the public lands are subject to the sovereignty of the State in which they are situated.

"It is a fair implication, that if the State were not restrained by compact, it could tax such lands. In many instances the States have taxed the lands on which our custom-houses and other public buildings have been constructed, and such taxes have been paid by the federal government. This applies only to the lands owned by the government as a proprietor, the jurisdiction never having been ceded by the State. THE PROPRIETORSHIP OF LAND IN A STATE BY THE GENERAL GOVERNMENT CANNOT, IT WOULD SEEM, ENLARGE ITS SOVEREIGNTY OR RESTRICT THE SOVEREIGNTY OF THE STATE. THIS SOVEREIGNTY EXTENDS TO THE STATE LIMITS OVER THE TERRITORY OF THE STATE, SUBJECT ONLY TO THE PROPRIETARY RIGHT OF THE LANDS OWNED BY THE FEDERAL GOVERNMENT, AND THE RIGHT TO DISPOSE OF SUCH LANDS AND PROTECT THEM UNDER SUCH REGULATIONS AS IT MAY DEEM PROPER. The State organizes its territory into

counties and townships, and regulates its process throughout its limits, and in the discharge of the ordinary functions of sovereignty. A State has a right to provide for intercourse between the citizens, commercial and otherwise, in every part of the State, by the establishment of easements, whether they may be common roads, turnpike, plank or railroads. The kind of easement must depend upon the discretion of the legislature. AND THIS POWER EXTENDS AS WELL OVER THE LANDS OWNED BY THE UNITED STATES, AS TO THOSE OWNED BY INDIVIDUALS. This power it is believed has been exercised by all the States in which the public lands have been situated. IT IS A POWER WHICH BELONGS TO THE STATE AND THE EXERCISE OF WHICH IS ESSENTIAL TO THE PROSPERITY AND ADVANCEMENT OF THE COUNTRY. State and county roads have been established and constructed over the public lands in a State under the laws of the State, without any doubt of its power, and with the acquiescence of the federal government. In this respect the lands of the public have been treated and appropriated by the State as the lands of individuals. These easements have so manifestly conduced to the public interest that no objection from any quarter has hitherto been made. And it is believed that this power belongs to the States.

"IT IS DIFFICULT TO PERCEIVE ON WHAT PRINCIPLE THE MERE OWNERSHIP OF LAND BY THE GENERAL GOVERNMENT WITHIN A STATE SHOULD PROHIBIT THE EXERCISE OF THE SOVEREIGN POWER OF THE STATE IN SO IMPORTANT A MATTER AS THE EASEMENTS NAMED. In no point of view are these improvements prejudicial to the general interest; on the contrary they greatly promote it. They encourage population and increase the value of land. In no respect is the

exercise of this power by the State inconsistent with a fair construction of the constitutional power of Congress over the public lands. It does not interfere with the disposition of the lands and instead of lessening, enhances their value.

"Where lands are reserved or held by the general government for specified and national purposes it may be admitted that a State cannot construct an easement which shall in any degree affect such purposes injuriously. No one can question the rights of the federal government to select the sites for its forts, arsenals, and other public buildings. The right claimed for the State has no reference to lands specially appropriated, but to those held as a general proprietor by the Government, whether surveyed or not. The right of eminent domain appertains to a State sovereignty, and it is exercised free from the restraint of the Federal Constitution. The property of individuals is subject to this right, and no reason is perceived why the aggregate property in a State, of the individuals of the Union, should not be subject to it. The principle is the same and the beneficial result to the proprietors is the same, in proportion to their interests. These easements have their course in State power and do not belong to federal action. They are necessary for the public at large and essential to the interests of the people of the State. The power of a State to construct a road, necessarily implies the right, not only to appropriate the line of the road, but the materials necessary for its construction and use. Whether we look to principle, or the structure of federal and State governments, or to the uniform practice of the new States, there would seem to be no doubt that a State has the power to construct a public road through the public lands. A grant to this effect is sometimes made by Congress, as in the act of 1852; but this does not show the neces-

sity of such a grant. Generally, Congress appropriates to the road a large amount of lands. The positions are believed to be irrefragable—first, that the right of eminent domain is in the State; that secondly, that the exercise of this right by a State is nowhere inhibited expressly or impliedly, in the Federal Constitution, or in the powers over the public lands by that instrument in Congress.”

In the leading case of *Shively v. Bowlby*, 152 U. S. p. 1, involving directly the title and jurisdiction over land under navigable waters, this Court fully reviews all the previous decisions and most exhaustively considers all of the questions, and finally, it may be assumed, sets them at rest.

In this same connection it considered many questions appertaining to the public lands; cited and affirmed many of the earlier cases and quoted at length with approval from *Pollard v. Hagan*, *supra*.

The Court held that the case did not turn upon the deed of cession, but upon general principles, as shown by the authorities cited. We quote from this case (152 U. S. pp. 49, 57-58) :

“The title to the shore and lands under tide water, said Mr. Justice Bradley, ‘is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery.’ ”

\* \* \* \* \*

“The Congress of the United States, in disposing of the public lands, has constantly acted upon the

theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country;"

\* \* \* \* \*

"Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

"The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

"The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

"Grants by Congress of portions of the public lands within a Territory to settlers thereon, though

bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution, in the United States."

*Leovy v. United States*, 177 U. S. p. 621 (opinion by the late Justice Shiras): Holding in favor of right of Louisiana to reclaim swamp and overflowed lands where claimed in conflict with navigation; a clear and strong opinion.

It will be observed that while there are a number of cases in point as to claimed conflicts between Federal and State laws as to public lands, they are not so numerous as the cases with respect to matters pertaining to navigation; this for the obvious reason that the Federal Government has large governmental functions to perform in regulating and protecting the public uses in connection with navigable waters. Its duties, however, as to the public lands are comparatively few and simple, to protect its proprietary rights and ultimate right of disposal. All other powers and duties so clearly belong to the State that conflicts, except incidental ones, are purely gratuitous. The effort to exercise taxing or police powers, or powers of regulating local industries by the Federal Government, in connection with the public lands, are of such

recent origin, so totally unwarranted and unnecessary, that few decisions can be found in point, but when they do occur they are very much in point and no case can be cited as a basis for the claim of any sovereign powers or duties, control or regulation, pertaining to the public lands on the part of the Federal Government in any State.

In *People v. Shearer*, 30 Cal. 658, Judge Sawyer said:

"The relation of the United States to the public lands since the admission of California into the Union is simply proprietary—that of an owner of the lands, like any citizen who owns land, and not that of a municipal sovereignty."

In *United States v. Cornell*, 2 Mason 60, Justice Story said:

"The purchase of lands by the United States for public purposes within the territorial limits of a State does not of itself oust the jurisdiction or sovereignty of such State over such lands so purchased."

Further, Judge Story said:

"Exclusive jurisdiction is the necessary attendant upon exclusive legislation. The Constitution of the United States declares that Congress shall have the power to exercise 'exclusive legislation' in all 'cases whatsoever' over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.



"When, therefore, a purchase of land for any of these purposes is made by the National Government, and the State legislature has given its consent to the purchase, the land so purchased, by the very terms of the Constitution, *ipso facto*, falls within the exclusive legislation of Congress, and the State jurisdiction is completely ousted.

"For it may well be doubted whether Congress is, by the terms of the Constitution, at liberty to purchase lands for forts, dock-yards, etc., with the consent of a State legislature where such consent is so qualified that it will not justify the 'exclusive legislation' of Congress there."

See also *Woodruff v. North Bloomfield, etc., Co.*, 18

Fed. p. 772:

"Upon the cession of California by Mexico, the sovereignty and the proprietorship of all the lands within its borders, in which no private interest had vested, passed to the United States. Upon the admission of California into the Union, upon an equal footing with the original States, the sovereignty for all internal municipal purposes and for all purposes except such purposes and with such powers as are expressly conferred upon the National Government by the Constitution of the United States, passed to the State of California. Thenceforth, the only interest of the United States in the public lands was that of a proprietor, like that of any other proprietor, except that the State, under the express terms upon which it was admitted, could pass no laws to interfere with their primary disposal, and they were not subject to taxation. *In all other respects the United States stood upon the same footing as private owners of land.* They could authorize no invasion of private property, either to enable their grantees to mine the lands



purchased by them of the Government, or otherwise. *Boggs v. Merced Min. Co.*, 14 Cal. 375, 376; *People v. Shearer*, 30 Cal. 658; *Pollard's Lessee v. Hagan*, 3 How. 223. The observations of Chief Justice Field in the first case cited, on pages 375, 376, are as applicable to this point as to that under discussion in that case."

See, also, *Mobile v. Eslava*, 16 Pet. 234, 253, where this Court said:

"The United States then may be said to claim for the public an easement for the transportation of merchandise, etc., in the navigable waters of the original States, while the right of property remains in the States.

"THE ORIGINAL STATES POSSESSING THIS INTEREST IN THE WATERS WITHIN THEIR JURISDICTIONAL LIMITS, THE NEW STATES CANNOT STAND UPON AN EQUAL FOOTING WITH THEM AS MEMBERS OF THE UNION IF THE UNITED STATES STILL RETAIN OVER THEIR NAVIGABLE WATERS ANY OTHER RIGHT THAN IS NECESSARY TO THE EXERCISE OF ITS CONSTITUTIONAL POWERS. To recapitulate, we are of the opinion: First, that the navigable waters within this State have been dedicated to the use of the citizens of the United States, so that it is not competent for Congress to grant a right of property in the same. \* \* \*"

We quote from the case of *Illinois R. R. Co. v. Illinois*, 146 U. S. 434:

"The State of Illinois was admitted into the Union in 1818 on an equal footing with the original

States in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio River, out of which the State was formed. But the equality prescribed would have existed if it had not been thus stipulated. THERE CAN BE NO DISTINCTION BETWEEN THE SEVERAL STATES OF THE UNION IN THE CHARACTER OF THE JURISDICTION, SOVEREIGNTY, AND DOMINION WHICH THEY MAY POSSESS AND EXERCISE OVER PERSONS AND SUBJECTS WITHIN THEIR RESPECTIVE LIMITS."

See also *New Orleans v. United States*, 10 Pet. 662, 736, where the Supreme Court says:

"The Government of the United States, as was observed in the argument, is one of limited powers. It can exercise authority over no subjects except those which have been delegated to it. Congress cannot by legislation enlarge the Federal jurisdiction, nor can it be enlarged under the treaty-making power."

See *Jennison v. Kirk*, 98 U. S. p. 453. Relating to the appropriation and beneficial use of water on the public lands and construing section 2339, United States Revised Statutes, we quote from page 458:

"Numerous regulations were adopted, or assumed to exist from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received

their sanction; and properties to the value of many millions rested upon them. For eighteen years—from 1848 to 1866—the regulations and customs of miners as enforced and moulded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands.”

*Broder v. Water Company*, 101 U. S. 274. We quote from page 276:

“It is the established doctrine of this Court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866, and that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: *Atchison v. Peterson*, 20 Wall 507, *Basey v. Gallagher*, id. 670; *Forbes v. Gracey*, 94 U. S. 762; *Jennison v. Kirk*, 98 id. 453.”

See also *Gutierrez v. Albuquerque*, 188 U. S. 545, where a territorial act for the appropriation of water on the public domain was upheld, the principal question being whether it was within the authority of the territory to

enact, it being conceded that a State would have such authority.

*Kansas v. Colorado*, 206 U. S. p. 46 (United States also a party by intervention). This case, two states, and the Federal Government being parties, and involving the main question here under consideration, is of peculiar significance.

To fully illustrate, we quote as follows:

"The primary question is, of course, of national control. For, if the nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two States in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce 'among the several States,' extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove obstructions in the natural waterways and preserve the navigability of those ways. In *United States v. Rio Grande Irrigation Company*, 174 U. S. 690, in which was considered the validity of the appropriation of the water of a stream by virtue of local legislation, so far as such appropriation affected the navigability of the stream, we said (page 703)": (Quoting from the above case the Court said in part as follows:)

"'In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in the Government the right to take all needed measures to preserve the navigability of the navigable water course of the country even against any State action.'

"It follows from this that if in the present case the National Government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the Government makes no such contention. On the contrary, it distinctly asserts that the Arkansas river is not now and never was practically navigable beyond Fort Gibson in the Indian Territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.

\* \* \* \* \*

"We must look beyond Section 8 for congressional authority over arid lands, and it is said to be found in the second paragraph of Section 3 of Article IV, reading: 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, *or of any particular State.*'

"The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words 'territory or other property.' It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this Court in respect thereto. BUT CLEARLY IT DOES NOT GRANT TO CONGRESS ANY LEGISLATIVE CONTROL OVER THE STATES, AND MUST, SO FAR AS

THEY ARE CONCERNED, BE LIMITED TO  
AUTHORITY OVER THE PROPERTY BELONGING  
TO THE UNITED STATES WITHIN THEIR  
LIMITS.

\* \* \* \* \*

"WE DO NOT MEAN THAT ITS LEGISLA-  
TION CAN OVERRIDE STATE LAWS IN RE-  
SPECT TO THE GENERAL SUBJECT OF RECLA-  
MATION. WHILE ARID LANDS ARE TO BE  
FOUND, MAINLY IF NOT ONLY IN THE WEST-  
ERN AND NEWER STATES, YET THE POWERS  
OF THE NATIONAL GOVERNMENT WITHIN  
THE LIMITS OF THOSE STATES ARE THE  
SAME (NO GREATER AND NO LESS) THAN  
THOSE WITHIN THE LIMITS OF THE ORIGINAL  
THIRTEEN, AND IT WOULD BE STRANGE IF,  
IN THE ABSENCE OF A DEFINITE GRANT OF  
POWER, THE NATIONAL GOVERNMENT COULD  
ENTER THE TERRITORY OF THE STATES  
ALONG THE ATLANTIC AND LEGISLATE IN  
RESPECT TO IMPROVING BY IRRIGATION OR  
OTHERWISE THE LANDS WITHIN THEIR  
BORDERS.

\* \* \* \* \*

"But it is useless to pursue the inquiry further  
in this direction. It is enough for the purposes of  
this case that each State has full jurisdiction over  
the lands within its borders, including the beds of  
streams and other waters. *Martin v. Waddell*, 16 Pet.  
367; *Pollard v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*,  
9 How. 471; *Barney v. Keokuk*, 94 U. S. 324; *St.  
Louis v. Myers*, 113 U. S. 566; *Packer v. Bird*, 137  
U. S. 661; *Hardin v. Jordan*, 140 U. S. 371; *Kaukauna  
Water Power Company v. Green Bay & Mississippi  
Canal Company*, 142 U. S. 254; *Shively v. Bowlby*, 152  
U. S. 1; *Water Power Co. v. Water Com.*, 168 U. S.  
349; *Kean v. Calumet Canal Company*, 190 U. S. 452.

\* \* \* \* \*

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law, as the exigencies of the particular case may demand.

"ONE CARDINAL RULE UNDERLYING ALL THE RELATIONS OF THE STATES TO EACH OTHER, IS THAT OF EQUALITY OF RIGHT. EACH STATE STANDS ON THE SAME LEVEL WITH ALL THE REST. IT CAN IMPOSE ITS OWN LEGISLATION ON NO ONE OF THE OTHERS, AND IS BOUND TO YIELD ITS OWN VIEWS TO NONE."

See also *Hudson Water Company v. McCarter*, 209 U. S. 349, 356. Opinion by Mr. Justice Holmes, holding broadly that one of the highest functions of a State is to protect its citizens in the full and complete use of its flowing waters, and their manifest beneficial uses. We quote:

"It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State as quasi-sovereign and representative of the interests of the public has a standing in Court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. *Kansas v. Colorado*, 185 U. S. 125, 141, 142; *S. C. 206 U. S. 46, 99*; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 238. What it may protect by suit in this Court from interference in the name of property outside of the State's jurisdiction, one would think that it could protect by statute from interference in the same



name within. On this principle of public interest and police power, and not merely as the inheritor of a royal prerogative, the State may make laws for the preservation of game, which seems a stronger case. *Geer v. Connecticut*, 161 U. S. 519, 534.

"The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the right of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."

A clear statement of the doctrine will be found in the case of *Coyle v. Smith*, 221 U. S. page 559, at page 566, wherein the Court says:



"The power of Congress in respect to the admission of new States is found in the third section of the fourth Article of the Constitution. That provision is that, 'new States may be admitted by the Congress into this Union.' The only expressed restriction upon this power is that no new State shall be formed within the jurisdiction of any other State, nor by the junction of two or more States, or parts of States, without the consent of such States, as well as of Congress.

"But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, 'a power to admit States.'

"The definition of 'a State' is found in the powers possessed by the original States which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union. The first two States admitted into the Union were the States of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the State is admitted 'as a new and *entire member* of the United States of America.' Emphatic and significant as is the phrase admitted as 'an entire member,' even stronger was the declaration upon the admission in 1796 of Tennessee, as the third new State, it being declared to be 'one of the United States of America,' 'on an equal footing with the original States in all respects whatsoever,' phraseology which has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted 'on an equal footing with the original States.'

"The power is to admit 'new States into *this* Union.'

" 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert the residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

"The argument that Congress derives from the duty of 'guaranteeing' to each State in this Union a republican form of government, power to impose restrictions upon a new State which deprives it of equality with other members of the Union, has no merit."

It is of importance here to observe that it is a matter well settled in the authorities which we have quoted, that uses over the public lands are necessarily perpetual, and this is recognized by the Act of 1866 and other legislation confirmatory of the same, and it is recognized as a matter of right and of policy, as well, that all uses in their nature, either of permanent or of

indefinite duration, shall be perpetuated, or in any event enjoyed during the existence of the beneficial use.

In other words, the necessity of the Federal Government in, and its power over, the public lands is proprietary in its nature, and it should and must allow or grant what any other proprietor should or must grant or allow.

As held in the case of *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, and in other cases concerning the navigable waters, the authority and duties of the United States are governmental and it necessarily follows that any occupancy or use in connection with the navigable waters, or that may be required in connection with the further development of the same, are temporary and revocable and subject to any later governmental procedure which the United States may desire to take.

In that case, the proprietary interest of the riparian owner, whether State or individual, was held to be subject to the exercise of the governmental power of Congress to regulate commerce, and its implied power over navigation. In like manner, the mere proprietary interest of the Federal Government in vacant public lands is at all times subject to the governmental or police power of the States retained by them and reserved in the tenth amendment to the Constitution.

## HISTORICAL REFERENCES AND SUGGESTIONS.

Probably no one person was in a better position to thoroughly understand to the fullest degree all of the historical connections with relation to the adoption of the Constitution, than was James Madison, and his attitude was always judicial and scholarly, he having given great attention to the questions involved in connection with the public lands, as well as other questions discussed by the Convention and settled by the Constitution.

In the Madison reports of the debates in the Constitutional Convention, Vol. III, Documentary History of the Constitution, 306, 307, Mr. Mason is quoted as having said on July 11, 1787:

"Strong had been drawn the danger to the Atlantic interests from new eastern States. Ought we to sacrifice what we know to be right in itself, lest it should prove favorable to States which are not yet in existence? If the western States are to be admitted into the Union as they arise, they must, he would repeat, be treated as equals and subjected to no degrading discriminations. They will have the same pride and other passions which we have and will either not unite with or will speedily revolt from the Union, if they are not in all respects placed on an equal footing with their brethren."

And at page 308, Mr. Randolph said:

"Congress have pledged the public faith to new States, that they shall be admitted on equal terms. They never would nor ought to accede on any other."

Mr. Gouverneur Morris was opposed to placing the new States on an equality with the old. In fact, his position, which was frankly stated, coincides exactly with those officials of the Federal Government who today are undertaking to furnish self-government, ready made, for the western States through the public lands. We quote from his remarks on page 312 of the volume referred to, as follows:

"The remarks of Mr. Mason relative to the western country had not changed his opinion on that head. Among other objections, it must be apparent they would not be able to furnish men equally enlightened to share in the administration of our common interests. The busiest haunts of men, not the remote wilderness was the proper school of political talents. If the western people get the power into their hands they will ruin the Atlantic interests. The back members are always the most adverse to the best measures."

Mr. Madison (page 314) replied that,

"with regard to the western States he was clear and firm in opinion that no unfavorable distinctions were admissible either in point of justice or policy."

It may be parenthetically observed that except, assuming as Mr. Morris did, in the language above quoted, that the busiest haunts of men, not the remote wilderness, are the proper school of political talents, there can be no sound argument in favor of the governmental restrictions,

burdens and regulations proposed to be placed upon the public land states.

In effect the departments in Washington say that the people of these particular States are not capable of providing themselves with that character of self-government and protection which must be provided for themselves by the people living in the non-public land States, and that therefore, as to these public land States they will regulate and control their industries, permit or refuse their development at will, impose charges upon the products of their industries at will and determine the extent to which they shall be developed, the connections and combinations which they shall make, and to whom and upon what considerations their public utility properties shall be transferred.

The recognized foremost advocate, in the Convention, of a strong and centralized government, was Alexander Hamilton, and therefore, when Mr. Hamilton is quoted upon the construction of the Constitution and that construction sets forth and defines the reserved right of the States, the expression certainly comes from the highest authority that could be found in support of such construction favorable to the reserved powers of the States.

With this in mind, we quote from the "Federalist" No. 78, Constitutional Ed., Vol. 12, page 258, as follows:

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that a deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do, not only what their powers do not authorize, but what they forbid."

And again in No. 32, Vol. II, page 246, he says:

"An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had and which were not, by that Act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory and repugnant*."

And again at page 250, in the same number, he says:

"The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign



power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution. We find, then, that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the Act, which justifies the position I have advanced, and refutes every hypothesis to the contrary."

And in No. 39, Vol. II, page 316, Madison, in delineating in what respects the proposed government is national and in what respects Federal, says:

"The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."

And again in No. 45, Vol. II, page 385, he says:

"The powers delegated by the proposed constitution to the Federal Government are few and defined.

Those which are to remain in the State governments are numerous and indefinite."

We have already cited authorities of this Court clearly holding that the use and disposition of non-navigable waters is solely a matter of State concern and control.

It is quite as true now as it was in 1861, when President Lincoln, in his inaugural address, referring to the maintenance inviolate of the rights of the States, re-affirms the declaration of the platform on which he was elected, that the same

"is essential to that balance of power upon which the perfection and endurance of our political fabric depend."

Referring to this question of the asserted power of the Federal Government through the public lands, President Monroe (see Messages and Papers of Presidents, Vol. II, pages 174 and 175) said:

"Thus the power of Congress over the ceded territory was not only limited to these special objects, but was also temporary. As soon as the territory became a State the jurisdiction over it as it had before existed ceased. It extended afterwards only to the unsold lands, and as soon as the whole were sold it ceased in that sense also altogether. From that moment the United States have no jurisdiction or power in the new States other than in the old, nor can it be obtained, except by amendment to the Constitution."

And, quoting from a very high modern authority, "Life of Thomas H. Benton," by Theodore Roosevelt

(American Statesmen, 1886), the author says at pages 67 and 68:

"During Adams' term Benton began his fight for disposing of the public lands at a small cost. It was a move of enormous importance to the whole West; and Benton's long and sturdy contest for it, and for the right of pre-emption, entitle him to the greatest credit. He never gave up the struggle although repulsed again and again, and at the best only partially successful; for he had to encounter much opposition, *especially from the short-sighted selfishness of many of the Northeasterners, who wished to consider the public lands purely as sources of revenue.* He utterly opposed the then existing system of selling land to the highest bidder—a most hurtful practice; and objected to the establishment of an arbitrary minimum price which practically kept all land below a certain value out of the market altogether. He succeeded in establishing the pre-emption system, and had the system of renting public mines, etc., abolished; and he struggled for the principle of giving land outright to settlers in certain cases. As a whole, his theory of a liberal system of land distribution was undoubtedly the correct one, and he deserves the greatest credit for having pushed it as he did."

Also, from page 145:

*"Benton attacked the proposal very ably, showing the viciousness of a scheme which would degrade every State government into the position of mendicant, and would allow money to be collected from the citizens with one hand in order to be given back to them with the other."*

We refer also to President Polk's message (Messages, Vol. IV, page 410); President Fillmore's message (Vol. V,

page 87), and Fiske's Critical Period of American History, pages 237-239.

#### REFERENCE TO ACTS OF CONGRESS.

Inasmuch as the construction of the Acts of Congress enter into certain decisions of this Court, and especially as we think the Acts of Congress referred to, construed in their entirety, are in and of themselves entirely conclusive of this case, we will here set for the acts referred to, either in full or with such extracts therefrom as we think are sufficient to clearly set forth all of the provisions thereof applicable to any matters under consideration in this case.

#### EXTRACTS FROM THE STATUTES OF THE UNITED STATES RELATING TO WATER RIGHTS AND RIGHTS OF WAY FOR RESERVOIRS AND CANALS UPON THE PUBLIC LANDS AND RESERVATIONS OF THE UNITED STATES.

CHAP. CCLXII. AN ACT GRANTING THE RIGHT OF WAY TO DITCH AND CANAL OWNERS OVER THE PUBLIC LANDS, AND FOR OTHER PURPOSES, APPROVED JULY 26, 1866.

14 *U. S. Stats. at L.*, 251, 253.

"Sec. 9. And be it further enacted, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same

are recognized and acknowledged by local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid is hereby acknowledged and confirmed; *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

CHAP. CCXXXV. AN ACT TO AMEND "AN ACT GRANTING THE RIGHT OF WAY TO DITCH AND CANAL OWNERS OVER THE PUBLIC LANDS, AND FOR OTHER PURPOSES," APPROVED, JULY 9, 1870.

16 *U. S. Stats. at L.*, 217, 218.

"Sec. 17. And be it further enacted, That none of the rights conferred by Sections five, eight and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water right or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. But nothing in this act shall be construed to repeal, impair, or in any way affect the provision of the 'Act granting to A. Sutor the right of way and other privileges to aid in the construction of a draining and exploring

tunnel to the Comstock lode, in the State of Nevada,' approved July twenty-fifth, eighteen hundred and sixty-six."

#### U. S. REVISED STATUTES.

"Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the rights of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

#### CHAP. 107. AN ACT TO PROVIDE FOR THE SALE OF DESERT LANDS IN CERTAIN STATES AND TERRITORIES, APPROVED MARCH 3, 1877.

19 *U. S. Stats. at L.*, 377.

This statute, after providing for the sale of desert lands, and the appropriation of water for the reclamation of the same, declares that:

"All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

CHAP. 561. AN ACT TO REPEAL TIMBER-CULTURE LAWS, AND FOR OTHER PURPOSES, APPROVED MARCH 3, 1891.

26 *U. S. Stats. at L.*, 1095, 1101-2.

"Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch; *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other



purposes under authority of the respective States or Territories.

"Sec. 19. That any canal or ditch company desiring to secure any benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"Sec. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or associations of individuals on the filing of certificates and maps herein provided for. If such ditch, canal or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided, That if*

any section of said canal or ditch, shall not be completed within five years after the location of this section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture.

"Sec. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance and care of said canal or ditch.

"Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservation and the limits thereof."

CHAP. 37. AN ACT TO PERMIT THE USE OF  
THE RIGHT OF WAY THROUGH THE PUBLIC  
LANDS FOR TRAMROADS, CANALS  
AND RESERVOIRS, AND FOR OTHER PURPOSES,  
APPROVED, JANUARY 21, 1895.

28 *U. S. Stats. at L.*, 635.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of

the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber."

CHAP. 179. AN ACT TO AMEND THE ACT APPROVED MARCH THIRD, EIGHTEEN HUNDRED AND NINETY-ONE, GRANTING THE RIGHT OF WAY UPON THE PUBLIC LANDS FOR RESERVOIR AND CANAL PURPOSES, APPROVED MAY 14, 1896.

29 *U. S. Stats. at L.*, 120.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED, That the act entitled 'An Act to permit the use of the right of way through the public lands for tramroads, canals and reservoirs, and for other purposes', approved January twenty-first, eighteen hundred and ninety-five be, and the same is hereby amended by adding thereto the following:

'Sec. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States for the

purposes of generating, manufacturing, or distributing electric power."

CHAP. 335. AN ACT TO PROVIDE FOR THE USE AND OCCUPATION OF RESERVOIR SITES RESERVED, APPROVED FEBRUARY 26, 1897.

29 *U. S. Stats. at L.*, 599.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED, That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right of way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situated."

CHAP. 2. AN ACT MAKING APPROPRIATIONS FOR SUNDRY CIVIL EXPENSES OF THE GOVERNMENT FOR THE FISCAL YEAR ENDING JUNE THIRTIETH, EIGHTEEN HUNDRED AND NINETY-EIGHT, AND FOR OTHER PURPOSES, APPROVED JUNE 4, 1897.

30 *U. S. Stats. at L.*, 11, 34-36.

"All public lands heretofore designated and reserved by the President of the United States under

the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destructions; and any violation of the provisions of this Act or of such rules and regulations shall be punished as is provided for in the Act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forest thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Com-

missioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors, for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservation may be located.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof; *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issu-



ing the patent to cover the tract selected; *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

The jurisdiction, both civil and criminal, over persons within such reservation shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

All water on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published, in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due

examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve."

CHAP. 292. AN ACT TO AMEND AN ACT TO PERMIT THE USE OF THE RIGHT OF WAY THROUGH PUBLIC LANDS FOR TRAMROADS, CANALS, AND RESERVOIRS, AND FOR OTHER PURPOSES, APPROVED MAY 11, 1898.

30 *U. S. Stats. at L.*, 404:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Act entitled 'An Act to permit the use of the right of way through the public lands for tramroads, canals and reservoirs, and for other purposes,' approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public and other beneficial uses.

'Sec. 2. That the rights of way for ditches, canals or reservoirs heretofore or hereafter approved under the provisions of Sections eighteen, nineteen, twenty, and twenty-one of the Act entitled "An Act to repeal timber-culture laws, and for other purposes, approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.'"

CHAP. 372. AN ACT RELATING TO RIGHTS OF WAY THROUGH CERTAIN PARKS, RESERVATIONS, AND OTHER PUBLIC LANDS, APPROVED FEBRUARY 15, 1901.

31 *U. S. Stats. at L.*, 790.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Secretary of the Interior be,

and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forests and other reservations of the United States, and the Yosemite, Sequoia and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe-lines, flumes, tunnels or other water conduits, and for water plants, dams and reservoirs used to promote irrigation or mining or quarrying or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof or not to exceed fifty feet each side of the center line of such pipes and pipe-lines, electrical, telegraph and telephone lines and poles, by any citizen, association or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named; *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest; *Provided Further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain; *And Provided Further*,

That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation or park."

CHAP. 1093. AN ACT APPROPRIATING THE RECEIPTS FROM THE SALE AND DISPOSAL OF PUBLIC LANDS IN CERTAIN STATES AND TERRITORIES TO THE CONSTRUCTION OF IRRIGATION WORKS FOR THE RECLAMATION OF ARID LANDS, A P-PROVED JUNE 17, 1902.

32 *U. S. Stats. at L.*, 388, 390.

"Sec. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government, or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof; *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure and the limit of the right."

CHAP. 3504. AN ACT MAKING APPROPRIATIONS FOR THE CURRENT AND CONTINGENT EXPENSES OF THE INDIAN DEPART-

MENT, FOR FULFILLING TREATY STIPULATIONS WITH VARIOUS INDIAN TRIBES, AND FOR OTHER PURPOSES, FOR THE FISCAL YEAR ENDING JUNE THIRTIETH, NINETEEN HUNDRED AND SEVEN. APPROVED JUNE 21, 1906.

34 U. S. Stats. at L. 325, 375.

This act in making, *inter alia*, an appropriation for irrigation systems in the State of Utah, contains the following:

"Provided that such irrigation system shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah, and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto; *and provided*, further, That the ditches and canals of such irrigation systems may be used, extended or enlarged for the purpose of conveying water by any persons, association or corporation under and upon compliance with the provisions of the laws of the State of Utah."

CHAP. 288. AN ACT PROVIDING FOR THE TRANSFER OF FOREST RESERVES FROM THE DEPARTMENT OF THE INTERIOR TO THE DEPARTMENT OF AGRICULTURE, APPROVED FEBRUARY 1, 1905.

33 U. S. Stats. at L., 628.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Secretary of the Department

of Agriculture shall, from and after the passage of this Act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the Acts entitled 'An Act to repeal the timber-culture laws, and for other purposes, approved March third, eighteen hundred and ninety-one and Acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying or patenting of any of such lands.

"Sec. 2. That pulp wood or wood pulp manufactured from timber in the district of Alaska may be exported therefrom.

"Sec. 3. That forest supervisors and rangers shall be selected, when practicable, from qualified citizens of the States or Territories in which the said reserves, respectively, are situated.

"Sec. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal and mining purposes, and for the purposes of milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior and subject to the laws of the State or Territory in which said reserves are respectively situated.

"Sec. 5. That all money received from the sale of any products or the use of any land or resources of said forest reserves shall be covered into the Treasury of the United States and for a period of five years from the passage of this Act shall constitute a special



fund available until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement, and extension of Federal forest reserves."

CHAP. 456. AN ACT FOR THE PROTECTION OF  
THE PUBLIC FOREST RESERVE AND NA-  
TIONAL PARKS OF THE UNITED STATES,  
APPROVED FEBRUARY 6, 1905.

33 *U. S. Stats. at L.*, 700.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATE OF AMERICA IN CONGRESS ASSEMBLED, That all persons employed in the forest reserve and national park service of the United States shall have authority to make arrests for the violation of the laws and regulations relating to the forest reserves and national parks and any person so arrested shall be taken before the nearest United States commissioner, within whose jurisdiction the reservation or national park is located, for trial, and upon sworn information by any competent person any United States Commissioner in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said laws and regulations, but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said laws and regulations."

THE APPROPRIATION OF WATER FOR BENEFICIAL  
USES IS UNDER THE EXCLUSIVE CONTROL  
OF THE STATE.

It does not appear to us that the right of the respective States, regardless of the ownership of public lands therein by the United States to control the appropriation and acquisition of water for all beneficial uses and purposes can become an issue in this case. But in view of the situation that this question, although apparently for a long time universally conceded, has been recently disputed, and in view of the importance of this case and the desirability of having all important questions that may have any relation to or in any way obscure the main issue, clearly before the Court and definitely decided, we have concluded that it is right that this subject should be presented in this brief, although we know of no ground upon which it can be disputed, either upon principle or authority; notwithstanding the fact that we have read some briefs emanating from departmental sources which have gone to great length in an argument to the effect that the United States Government may control the water as well as the land within a public land State.

As an elementary proposition, it would appear to be clear since all of the powers not delegated to the Federal government nor prohibited to the States, are reserved to the States, or the people; and since there is no reference in the Constitution to the control or regulation of any waters or the use thereof by the Federal Government, except

the implied power to control navigation, that control and regulation, for all other purposes, must of necessity be in the State.

Not only is there an entire absence of any delegated authority in the Federal Government over non-navigable waters, or their appropriation or beneficial use, but there is a consistent absence of any attempted assertion of jurisdiction on the part of the Federal Government in connection with such appropriation and beneficial use of water, and, correspondingly, there is a consistently uniform assertion and exercise of such authority and control by all of the States, including all of the public land States.

We have already cited the case of *Kansas v. Colorado*, 206 U. S. page 46, and the case of *Hudson Water Co. v. McCarter*, 209 U. S. 349, which are leading and important decisions by this Court on this question. It will also be recalled that in the case of *Kansas v. Colorado*, the petition in intervention on behalf of the United States was dismissed, because it did not appear that there was any interference with navigation.

Congress has not only never asserted any authority over the water in non-navigable streams, or control over the appropriation of the same, but in all of its legislation it is recognized that this control is in the respective States.

*The Act of 1866, U. S. Rev. Statutes, Sec. 2339*, is a comprehensive recognition of the right to acquire by appropriation and for beneficial uses the waters of streams through and in connection with the local customs, laws and decisions of the courts.

Not only has this controlling and comprehensive recognition by Congress never been repealed, but it has very frequently been re-enacted or re-affirmed. This was done in an especially comprehensive way in what is referred to as the "*Desert Land Act, Approved March 3, 1877*," already quoted in this brief.

The proviso in this Act is not only in strict accordance with the local laws on the subject, and in that sense a complete recognition of the rights of the States to control the appropriation and use of their waters, but, furthermore, it is a comprehensive dedication of the proprietary interest of the government to the operation of the local laws, whether State or territorial. Regarded merely as a dedication, accepted and acted upon by the local government, and made the basis of their property laws, it should be deemed irrevocable. But, so far as the States are concerned, this right rests upon the higher ground that it is based on the Constitution itself.

Also, in the "*Act to Provide for the Use and Occupation of Reservoir Sites*," approved February 26, 1897,

and in the Act approved June 4th, 1897, both of which have been heretofore set forth in this brief.

It will be observed that this latter act contains the following language:

"All waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

The laws of the United States therein mentioned can only refer to the laws which may be constitutionally enacted under the power of Congress to regulate commerce. However, it must be kept in mind also that the reserves under consideration were situate in Territories as well as in States, and where not situated within a State, they would be subject to the laws of the Territory or of the United States. Clearly, where the waters were appropriated within a State they were to be subject solely to State laws. We again quote this portion of the language:

"\* \* \* under the laws of the State wherein such forest reserves are situated, or under the laws of the United States and the rules and regulations established thereunder."

It is unnecessary to pursue the subject in the effort to cite all available provisions of this character, but it should be observed that not only is the attitude of

Congress consistent and uniform in this regard, but that of the Departments—which is frequently not true in other matters, is consistent with the Act of Congress, and the rules and regulations set forth in the answer and contained in the Transcript herein very clearly recognize that the water rights and the right to the appropriation and beneficial use of water is acquired from the State and is not in the United States or claimed by the United States.

In the recent case of *Illinois Ex Rel Dunne v. Economy Light & Power Company*, 234 U. S. 497, the State sought to bring to this Court a proceeding in error from its State Supreme Court. The information was for the abatement of what was claimed to be a nuisance in maintaining a dam on the Des Plaines River, a considerable stream, which had been declared navigable by early legislation of Congress and of the State, but in lapse of time had lost its navigable character as a fact. The Supreme Court of Illinois found it was not a navigable stream. The Court dismissed the proceeding and held that there is no Federal right involved in the obstruction or use by private owners of a non-navigable stream wholly within a State (citing *Crary v. Devlin*, 154 U. S. 619; *Egan v. Hart*, 165 U. S. 188; *Cameron v. United States*, 146 U. S. 533).

See also:

- Veazie v. Moor*, 14 How. 568;  
*Gibbons v. Ogden*, 9 Wheat 1;  
*New York v. Miln*, 11 Pet. 102;  
*Brown v. State of Maryland*, 12 Wheat 419;  
*License Cases*, 5 How. 504;  
*Withers v. Buckley*, 20 How. 84;  
*Escanaba Co. v. Chicago*, 107 U. S. 678, 687;  
*Welton v. State of Missouri*, 91 U. S. 275;  
*Henderson v. Mayor of New York*, 92 id. 259;  
*County of Mobile v. Kimball*, 102 id. 691;  
*Pollard's Lessee v. Hagan*, 3 How. 212;  
*Permoli v. First Municipality*, id. 589;  
*Strader v. Graham*, 10 id. 82;  
*Huse v. Glover*, 119 U. S. 544, 548, 549;  
*Spooner v. McConnell*, 1 McLean 337;  
*Kellogg v. Union Co.*, 12 Conn. 7;  
*Thames Bank v. Lovell*, 18 Conn. 500;  
*S. C.* 46 Am. Dec. 332;  
*McReynolds v. Smallhouse*, 8 Bush. 447;  
*Sands v. Manistee River Improv. Co.*, 123 U. S. 288, 296;  
*Van Brocklin v. Tennessee*, 117 U. S. 151, 159;  
*Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 11;  
*Hamilton v. Vicksburg, Etc. R. R. Co.*, 119 U. S. 280;  
*Cardwell v. American Bridge Co.*, 113 U. S. 205;  
*Hudson Water Company v. McCarter*, 209 U. S. 349, 355;  
*Kansas v. Colorado*, 185 U. S. 125, 141; 206 U. S. 46, 99;  
*Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 238;  
*Geer v. Connecticut*, 161 U. S. 519, 534.



Nearly all of these cases have heretofore been cited and in most instances quotations made therefrom in the portion of this brief discussing the questions of governmental authority involved in this case.

Not only has the control of water and its appropriation and beneficial use been acknowledged by Congress, as we have already shown, but the right to such control and regulation has been asserted by and has been uniformly conceded to the States. The laws of all of the public land States with which we are familiar are uniformly to this effect, and are consistent with this view.

The legislation of Utah on this subject is express from its earliest history. The Territory was organized by act of September 9, 1850, with legislative power vested in the governor, and a legislative assembly extending to all rightful subjects of legislation consistent with the Constitution of the United States and provisions of the organic act, but inhibited of power to pass any act interfering with primary disposal of the soil. The Act provided that all laws passed by the legislative assembly and governor should be submitted to the Congress of the United States, and if by Congress disapproved, should be null and of no effect.

On February 20, 1880, Utah Session Laws, 1880, page 40, the Governor of Utah approved an act passed

by the legislative assembly, which after recognizing a right to the use of water for certain useful purposes to have vested and accrued as a primary right, to the extent of, and reasonable necessity for, such use thereof under certain circumstances in the act mentioned, and after recognizing that a secondary right to the use of water for any of such useful purposes had vested and accrued, to the extent of and reasonable necessity for such use thereof under certain other circumstances in the act mentioned, provided in Section 15 thereof, as follows:

"Sec. 15. All persons shall have the right of way across and upon public, private and corporate lands, or other right of way, for the construction and repair of all necessary reservoirs, dams, watergates, canals, ditches, flumes or other means of securing and conveying water for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property."

This act was reported to Congress and was never disapproved, and remained in force during the entire territorial existence of the then Territory, now State, of Utah.

On January 4, 1896, the Territory was admitted into the Union as a State, by proclamation of the President of the United States, pursuant to the Enabling Act, approved July 6th, 1894.

On November 5, 1895, the State Constitution was adopted, and Article XVII provided that all existing rights to the use of any waters of the State for any useful or beneficial purpose were thereby recognized and confirmed.

Also by Article XXIV, Section 2, that all laws of the Territory of Utah then in force not repugnant to said Constitution should remain in force until they expire by their own limitation, or are altered or repealed by the legislature. The foregoing recited Act was not changed by the Enabling Act and was not repugnant to either the Constitution of the United States or of the State, and it became and remains the law of the State.

April 5, 1896, Utah Session Laws, 1896, page 316, a legislative Act was approved, entitled,

**"AN ACT TO ENCOURAGE THE IRRIGATION OF LAND, SMELTING AND OTHER REDUCTION OF ORES, AND THE USE AND APPLICATION OF UNAPPROPRIATED WATERS OF NATURAL STREAMS AND WATER COURSES, TO THE GENERATION OF ELECTRICAL FORCE AND ENERGY, AND TO PROVIDE FOR THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN THEREFOR,"**

Which, among other things, provided that:

**"The cultivation and irrigation of the soil, the production and reduction of ores, are of vital necessity to the people of the State of Utah; are pursuits in**

which all are interested, and from which all derive benefit; and the use and application of the unappropriated waters of the natural streams and water courses of the State to the generation of electrical force or energy to be employed in industrial pursuits are of great public benefit and utility. So irrigation of land, the mining, milling, smelting or other reduction of ores, and such use and application of such waters for the generation of electrical power to be employed as aforesaid, are hereby declared to be for the public use, and the right of eminent domain may be exercised in behalf thereof."

March 11, 1897, Utah Session Laws, 1897, p. 223, a legislative Act was approved entitled:

**"AN ACT IN RELATION TO WATER RIGHTS  
AND IRRIGATION AND MAKING PROVISIONS  
REGULATING THE SAME,"**

Which, among other things, provided that:

"Any person or corporation shall have the right of way across and upon public, private, and corporate lands, or other right of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, or other means of securing, storing and conveying water for irrigation or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, and not to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by

law for the taking of private property for public use."

This statute making estates in land servient to distribution of waters even for benefit of private owners was upheld by this Court in *Clark v. Nash*, 198 U. S., 361, 367, where it is said:

"The plaintiffs in error contend that the proposed use of the enlarged ditch across their land for the purpose of conveying water to the land of the defendant in error alone is not a public use, and that, therefore, the defendant in error has no constitutional or other right to condemn the land, or any portion of it, belonging to the plaintiffs in error, for that purpose. They argue that, although the use of water in the State of Utah for the purpose of mining or irrigation or manufacturing may be a public use where the right to use it is common to the public, yet that no individual has the right to condemn land for the purpose of conveying water to ditches across his neighbors land, for the purpose of irrigating his own land alone, even where there is, as in this case, a State statute permitting it."

and at page 369 the Court says:

"We are, however, as we have said, disposed to agree with the Utah Court with regard to the validity of this State statute, which provides under the circumstances stated in the act; for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless."

Also, in *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 160, the Court held:

"The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. In general the water to be used must be carried for some distance and over or through private property which cannot be taken *in invitum* if the use to which it is to be put be not public, and if there be no power to take property by condemnation it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. *Cole v. La Grange*, 113 U. S. 1. A private company or corporation without the power to acquire the land *in invitum* would be of no real benefit, and at any rate the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase, that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual; no one owner would find it possible to construct and maintain water works and canals any better than private corporations or companies, and unless they had the power of eminent domain they could accomplish nothing. If that power could be conferred upon them it could only be upon the ground that the property they took was to be taken for a public purpose.

"Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition and an effectual obstacle will, therefore, remain in the way of the advance of a large portion of the State in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless land would seem to be a public purpose and matter of public interest

not confined to the land owners, or even to any one section of the State."

If the claim should be asserted that the United States, in a governmental way, controlled or had a right to control all appropriation and beneficial use of non-navigable waters, great difficulty would be found in ascertaining where this authority begins and where it ends.

It has never been claimed to exist, and of course it could not be so claimed in any State wherein there are no public lands. In all other States its control has been strictly limited to the control requisite to protect the navigable waters and not in any other extent or in any other way.

Therefore, upon principal and authority, including numerous decisions of this Court, the same cannot possibly exist or be asserted in a State in which there are no public lands.

And if it is claimed that such authority could be asserted in a public land State, it would be difficult to show where, when and how. If with relation to any stream in question the Government owned no lands thereon, there could be no assertion, we assume, of any authority over such stream or the appropriation or beneficial use of the waters thereof, because the Government did own lands within the State not situated upon or with relation to the stream.



If the Government owned land bordering upon a stream, there ordinarily would be many other landed proprietors having an equal right and interest in the waters of that stream, subject to the laws of the State. So it could hardly be contended that the United States as a proprietor of such incidental lands, could assert congressional and governmental authority over the appropriation of all the water from such stream.

The whole matter then comes down to the claim and contention that, when the United States is the owner of land upon or adjacent to a stream, but not otherwise, it may, by exempting itself from the processes of eminent domain and by prohibiting the State and its agencies from using such land, either entirely prevent the use of the waters of such stream which would otherwise be undoubtedly solely subject to the power of the State, or require, as a condition of permitting such use of such water, compliance by the State or its agencies in that respect with whatever rules and regulations the United States might see fit to adopt, which rules and regulations, it is strangely assumed, may go to the extent of the exercise of governmental authority and control within that State and the imposition of charges on its industries and businesses which could not be exercised or enjoyed by the United States in another State wherein it owned no land. In other words that as to certain streams, the United States

has power to control and regulate the appropriation and use of their waters within a State, while as to all other streams within the State and, to the extent that the use of land of the United States is not required, even as to the streams over which the United States claims jurisdiction, the sole and exclusive power of control and regulation of the appropriation and use of water rests in the State. The mere statement of such a claim is, we submit, sufficient to demonstrate its absurdity.

Before concluding this subject, we desire to revert to the consideration that should be kept in mind in connection with all of the subjects and considerations involved, that is to say, that the incidental or servient thing in such a situation as is involved in this case, is the lands and rights of way thereover.

Such lands and rights of way are incidental and unimportant in comparison with the water, which is the dominant consideration and represents always the thing of value that is sought to be appropriated and used.

So it is true that the United States Government is in the position of trying to enjoy excessive revenues and to impose arbitrary conditions and to assert governmental authority derived solely from a proprietary right. It is also assuming that the servient and subordinate right of way is sufficient for such purposes of exceptional

revenue, control and authority, including the right to prohibit the enjoyment of the State's resources. It is further assuming, in connection with the subordinate, unimportant and servient element, namely, the right of way over lands which, subject to the right of the State, belong to the United States Government, that it may subordinate, regulate, charge and control the dominant and principal thing involved, namely, the water right and the enjoyment and beneficial use of the water.

We can conceive of nothing more out of accord with the fundamental principles of the Constitution and the decisions of this Court than the assertion of, and the insistence upon the enforcement of, such a position and claim as is here asserted by the appellee.

During the course of the argument in the case of *Kansas v. Colorado*, 206 U. S. 46, the argument being on behalf of the United States, Mr. Justice White (now Chief Justice) stated the matter in this way:

"You constantly talk about the public lands. When you speak of the public arid lands, are you deducing from the fact that they are public lands a governmental right or power in Congress? Do you suppose if there is a hundred acres of public land in a State, the existence of that public land in the State invests Congress as a government with the power to destroy the law of the State, because it owns land in the State, which an individual would not have?"

(Stenographic notes of argument.)

And in deciding the case of *Kansas v. Colorado*, supra, this Court said:

"But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.

"It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purpose of irrigation shall control. Congress cannot enforce either rule upon any State."

Apparently, no more direct or authoritative decision conclusive of the right of the State to control the appropriation and beneficial use of waters within its borders could be stated.

CONSIDERING THE CONSTRUCTION AND EFFECT OF THE VARIOUS ACTS OF CONGRESS WITH RELATION TO THE PUBLIC LANDS, AND SHOWING THAT THE ACTS OF CONGRESS NOT ONLY DO NOT PROHIBIT BUT EXPRESSLY RECOGNIZE THE USES HERE MADE AND NOW ENJOYED, AND THAT THE RULES OF THE SECRETARY OF AGRICULTURE SET FORTH IN THE ANSWER ARE NOT ONLY NOT AUTHORIZED BY THE ACTS OF CONGRESS, BUT ARE CONTRARY THERETO AND PROHIBITED THEREBY.

Before entering upon a detailed discussion of the subject just stated, it is of interest to observe that, in

the previous discussion of this and other cases, it has been contended and assumed on behalf of the United States that the rules and statutes here under consideration are in the nature of grants of public rights and property for private interests, and in derogation of public right and authority, and are, therefore, to be strictly construed.

In fact, in the decision of the Circuit Court of Appeals of the Eighth Circuit, in *United States v. Utah Power & Light Co.*, supra, to which we shall later refer in more detail, it was expressly suggested that if rights of way such as these are vested, they were thereby rid of or free from the control of Government.

We shall later assert and endeavor to show that such a view and theory are obviously incorrect, and that if these rights of way are vested it is obvious that they are vested only as to the proprietary right of the Government of the United States, as a landed proprietor, and that they are in no manner free from any governmental power of the United States or of the States in which they are situated.

We contend, and we think upon good reason and authority, that the reasons and rules of construction are, especially in cases and instances like this, and in fact, in nearly all cases, totally contrary to the arguments on behalf of the Government.

GENERAL ACTS OF CONGRESS INTENDED  
TO AID AND ENCOURAGE THE DEVELOPMENT  
OF THE COUNTRY SHOULD BE LIBERALLY  
CONSTRUED.

The Act of 1866, and subsequent legislation upon the subject, are of a general character and in aid of the development of the country. They are the exact antithesis of the Acts referred to in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, and the decisions of this Court following the same. The acts here in question should be read in the light of the more liberal rule laid down in *United States v. Denver & Rio Grande R. R. Co.*, 150 U. S. 1, 14, where the Court says:

"When an act, operating as a general law, and manifesting clearly the intentions of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."

The rule is also stated in *Chitty on Perogatives*, pages 393 and 394 as follows:

"But the rule that grants shall be construed most favorably for the King, is subject to many limitations and exceptions.

"In the first place, no strained or extravagant construction is to be made in favor of the King. If the intention be obvious, royal grants are to receive a fair and liberal interpretation accordingly.

"In the second place, the construction, and leaning shall be in favor of the subject, if the grant show that it was not made at the solicitation of the grantee.

"In the third place, if the King's grants are upon a valuable consideration, they shall be construed strictly for the patentee for the honor of the King.

"So where the King's grant is capable of two constructions, by the one of which it will be valid and by the other void, it shall receive that interpretation which will give it effect; 'for that will be more for the benefit of the subject and the honor of the King, which ought to be more regarded than his profit.'"

We have inserted the above quotation as instructive in that it shows the original and limitations of the rules contended for by appellant, but the situation here is very different and is very much more favorable to the rule for which we contend, because, in this instance, the United States is not "the King," nor in the connection here being considered the Government, but is a proprietor of the public lands in a proprietary capacity by virtue of the cession of the public lands to it under a practice inaugurated by the original States, and in declared deference to the rights of the States to have the lands disposed of and held subject to the eminent domain and the unquestioned powers of the State to develop its resources



and carry on its public uses unhampered by the ownership of the public lands by the Federal Government.

THE ACTS OF 1866 AND OF 1870, SECTIONS 2339 AND 2340 OF THE REVISED STATUTES, ARE TO BE CONSTRUED AS RECOGNIZING AND CONFIRMING THE RIGHTS HERE UNDER CONSIDERATION AND HAVE NOT BEEN REPEALED.

Section 2339 of the Revised Statutes (Act of July 26, 1866), and Section 2340 (Act of July 9, 1870), have heretofore been quoted in full. In the later consideration of the Acts of 1896 and 1901, we shall consider the question as to whether the Act of 1866 has been repealed, or is still in full force and effect as we claim it is. But we shall now proceed very briefly to discuss the scope and purposes of this Act. It is not only the first important Act of Congress bearing on rights of way for the use of water over the public lands, but it is doubtless the most important, and has been before this Court and other courts so often and has been so often upheld and construed, that any extended discussion would not be justified. We have previously cited and quoted from the cases of *Jennison v. Kirk*, 98 U. S. 453, and *Broder v. Water Co.*, 101 U. S. 274, wherein this Court, instead of treating the Act of 1866 as a grant of some special right or privilege, said, referring to the rights of miners and others who had constructed canals and ditches in the

region where such beneficial water is a necessity, that such rights

"\* \* \* are rights which the Government had, by its conduct recognized and encouraged, *and was bound to protect*, before the passage of the Act of 1866, and that the section of the Act which we have quoted was rather a *voluntary recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one." (Citing *Atchison v. Peterson*, 20 Wall 507; *Basey v. Gallagher*, id. 670; *Forbes v. Gracey*, 94 U. S. 762; *Jennison v. Kirk*, id. 453.)

An Act of Congress recognizing a natural, pre-existing right for the development, appropriation and beneficial use of water where it is an indispensable necessity, as it is in all of the arid States, is hardly within the line of cases referring to special privileges and immunities, and special Acts referring to particular individuals or corporations.

Recently there have been divers arguments and rulings having the effect to emasculate and misconstrue this Act. One of these efforts is represented by the assertion that because the use here is the generation and distribution of electric power, such use is not to be construed as within the Act of 1866, because such uses of water and development of power, were unknown at the date of the passage of this Act.

Certainly the language of Congress is too direct and comprehensive for any strained construction. Where the

right to the use of water by virtue of priority of possession is vested and accrued

"for mining, agriculture, manufacturing, or other purposes,"

the possessors and owner of such vested right shall be maintained and the owner of such vested right shall be maintained and protected in the right of way therefor.

It will be observed that while certain predominant uses of water are mentioned, namely, mining, agriculture and manufacturing, nevertheless the language is not to be mistaken or misunderstood, as it comprehensively includes all "other purposes." This alone would control the question of construction. However, it is clearly stated that the rights of way are predicated upon the existence of a water right. Whenever the local customs, laws and decisions of the courts (the State authority) recognize the validity of the possession of water for any beneficial use, then the right of way

"for the construction of ditches and canals" \* \* \*  
"is acknowledged and confirmed."

This language shows too clearly for misconstruction that any beneficial use is recognized, and also that the laws of the States shall determine whether these uses are beneficial or not, and whenever, either past, present or future, the water right is vested and accrued for the

beneficial use of water, the right of way therefore is acknowledged and confirmed by the United States.

In the case of *Kansas v. Colorado*, 206 U. S. 46, at page 87, the Court quotes with approval the following statement made in the brief of counsel for the United States, Intervener:

"That the doctrine of riparian rights is inapplicable to conditions prevailing in the arid region; that such doctrine if applicable in said region, would prevent the sale, reclamation, and cultivation of the public arid lands, and defeat the policy of the government in respect thereto; that the doctrine which is applicable to conditions in said arid region, and which prevails therein, is that the waters of natural streams may be used to irrigate and cultivate arid lands, whether riparian or nonriparian; and *that the priority of appropriation of such waters and the application of the same for beneficial purposes establishes a prior and superior right.*"

Thus, at the time when this case was decided, May 13th, 1907, eleven years after the passage of the Act of 1896 and six years after the passage of the Act of 1901, this doctrine of appropriation of water for any beneficial purposes was not only recognized by the Executive Department of the Government and their counsel, but was recognized and affirmed by this Court.

As to whether the generation of electric power is covered by the Act of 1866, we need only call attention to the statute itself and to the decision of the Circuit

Court of Appeals in *United States v. Utah Power & Light Company*, supra, where it was contended by counsel for the plaintiff that the Act did not cover this particular purpose and the Court repudiated the suggestion.

It will be observed also that Section 17 of the Act of July 9, 1870, heretofore quoted, provides that all patents granted shall be subject to any vested and accrued water rights,

"or rights to ditches and reservoirs used in connection with such water rights."

In other words, a continuing act under which all patents issued, so long as the law remains in force, must provide that the lands shall remain subject thereto and patents now issued contain this reservation.

The Act of 1866 has uniformly been construed by this and all other courts as a recognition and acknowledgment of the right of way over the public lands for all necessary purposes connected with the beneficial use of water whenever recognized under State laws.

The departments of the Government so recognized and uniformly construed the Act for more than thirty years, and we may, therefore, conclude this subject by suggesting that in the absence of any original basis therefor, the question of the construction of this Act, in the particulars referred to, should not be considered open for discussion at this date.

THE ACT OF MARCH 3, 1877, USUALLY REFERRED TO AS THE "DESERT LAND ACT."

This Act is set forth in the preceding Extracts from the Statutes and contains the declaration that

"all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights."

This Act of March 3rd, 1877, was construed by the Supreme Court of Oregon, in the case of *Hough v. Porter*, 51 Ore. 318; 98 Pac. 1083, and this Court construed it in connection with the Act of 1866, which was recognized as in effect on that date, January 5, 1909. The opinion is too exhaustive to be quoted from or briefly summarized, but in referring to the Act of 1866 as connected with the Act of 1877, the Court said:

"It was in the exercise of a similar prerogative on the part of the government that there was by the Act of 1877 given to the public, or to any individual thereof the right to appropriate and apply to a beneficial use the waters flowing through its public domain."

The Court further pointed out that there was no limit of time within which the right might be exercised, except that it must be prior to any other appropriation for beneficial use.

In substance it was held that whether this act should be called a grant, trust or dedication, it was, in effect, with relation to the public lands over which Congress had jurisdiction, a complete and unlimited dedication of the right of appropriation and beneficial use of the waters flowing in all of the unnavigable streams of the country.

The Court further says:

"It follows that the rights reserved to the public and the dedication of the surplus waters therefor were intended for use in that manner. Construed, then, with the Act of 1866 and other provisions of the Act of 1877, we are of the opinion that all lands settled upon after the date of the latter Act were accepted with the implied understanding that (except as hereinafter stated) the first to appropriate and use the water for the purpose specified in the Act should have the superior right thereto."

While finding it unnecessary to rule definitely on the question, this Court considered the decision above referred to (*Hough v. Porter*) in the case of *Boquillas Land & Cattle Co. v. Curtis*, 213 U. S. 339-344, and in that connection said:

"The opinion that we have expressed makes it unnecessary to decide whether lands in the arid regions, patented after the Act of March 3, 1877, chap. 107, 19 Stat. at L., 377, U. S. Comp. Stat. 1901, p. 1548, are not accepted subject to the rule that priority of appropriation gives priority of right by virtue of that Act, construed with Rev. Stat. Sec. 2339, U. S. Comp. Stat. 1901, p. 1437. The Supreme



Court of Oregon has rendered a decision to that affect on plausible grounds."

It would hardly be compatible with the construction of this act to hold that, while Congress in dealing with the public lands had with relation to these lands freely devoted and dedicated the waters to priority of beneficial use, at the same time the legislation concerning the public lands and rights of way thereover, with no expressions whatever of intention so to limit the same, was designed to limit this and other acts so that the use of the water so freely dedicated, so far as the water was concerned, should be restricted and, if one of the departments of the government so desired, prohibited by the rules and regulations of such department. In fact, this act in all of its particulars is entirely consistent with the broad understanding that from a fundamental and constitutional point of view the water so dedicated, together with the necessary rights of way for the use and enjoyment of the same, is in reality a reserved right inherent in the various States and in the people of such States.

#### THE ACT OF MARCH 3, 1891.

It is our contention, as already set forth, that the water rights, rights of way, and the connected public service have already vested in the appellant as a clear matter of constitutional and fundamental right, and this would

be true in the absence of any legislation on the subject whatever, and would result from a consideration and application of the undisputed facts in the case.

Further, it is our contention that the rights of way and uses involved are vested in the appellant under the clear, definite and unrepealed provisions of the act of 1866, recognizing the control of the local laws over the subject.

It is also our contention that these rights and uses are in like manner within and are vested under the act above referred to, namely, the act of March 3rd, 1891, which likewise recognizes the control of the local law.

This latter act with its amendments has probably been subject to the most strained and contradictory construction in the development of administrative usurpation of any act of Congress with relation to the public lands.

Section 18 of this Act, following substantially the Railway Right of Way Act of March 3rd, 1875, refers to a company organized for the purpose of irrigation but it is later provided in Section 20,

“that the provisions of this act shall apply to all canals, ditches or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals or associations of individuals, on the filing of the certificates and maps herein provided for.”

The departmental rulings, however, wholly ignoring the latter quoted language, and placing a controlling emphasis

on the words "formed for purposes of irrigation," have confined this act, and compelled it to be limited to the use of rights of way for water diverted for irrigation.

No doubt there are some ambiguities in this act, and if the clause last quoted had not been inserted therein, the privileges of the act might have been confined to canal or ditch companies formed for purposes of irrigation; that is to say, at least one of the purposes of such corporation must have been the purpose of irrigation. The construction, however, would apparently not have been justified that the sole purpose of such company must be the purpose of irrigation. Neither of these clauses, standing alone, could be reasonably interpreted as confining the use of the ditch or right of way to the conveyance of water for irrigation purposes.

Therefore, while we assume that it might reasonably have been held, in the absence of the later quoted language of the act, that one of the objects or purposes of the incorporation of the company must be that of irrigation to permit such company to avail itself of the provisions of the act, nevertheless, it is not possible as a matter of sound construction to hold that the use of the water flowing through such a canal should be limited and confined to purposes of irrigation, because the laws of all of the States wherein irrigation is practiced permit, where vested rights are not interfered with, the change of the

point of diversion and allow the privilege of making any beneficial use of the water available and not inconsistent with vested rights, and at the end of Section 18 this language is carried into the act:

"and the privilege herein granted shall not be construed to interfere with the control of water for irrigation *and other purposes* under the authority of the respective States or Territories."

It follows, of course, that any denial of the privilege of the use of these rights of way for any purpose connected with the beneficial use of water consistent with the laws of the State or Territory wherein the water is being used, is expressly contrary to the terms of the act, and it follows, if language is to be given its ordinary interpretation, that later and without limiting the language "to any canal or ditch company formed for purposes of irrigation" the provisions of the act were made applicable "to all canals, ditches or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals or associations of individuals," etc.

In view of the language of the act, the successful efforts of the department in the direction of placing undue and unnatural emphasis on certain provisions thereof, and wholly ignoring other and directly applicable language therein, presents a very interesting study in the psychology of statutory construction, to the end that certain "admins-

trative policies" may be accomplished, regardless of the language or intention of the law.

Obviously, for the purpose of meeting certain of these departmental constructions, the act of March 3rd, 1891, was amended by Section 2 of the act of May 11, 1898, as set forth in the acts of Congress heretofore quoted in this brief.

In this amendment it is provided that the rights of approved under the provisions of the section referred to of the act of March 3rd, 1891

"may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power as subsidiary to the main purpose of irrigation."

Instead of this amendment, which was obviously designed to broaden the act, being allowed to have that effect, the concluding language referring

"to the main purposes of irrigation"

was immediately seized upon for the purpose of fortifying the construction theretofore given the act limiting the same to purposes of irrigation.

Of course, the power development involved in this case, as well as almost all other power developments in the public land States, contribute largely to irrigation by supplying power for pumping water from streams and

subterranean sources. And the language used relates to the departmental construction of the act, and not to a correct interpretation of the act itself.

In our view the amendment under consideration was wholly unnecessary, because the right to the use of the right of way for all beneficial purposes was expressly provided for in the act when the use of the same was made subject to the laws of the State or Territory, such laws uniformly permitting all of the uses referred to.

However, it will be observed that the amendment provides first that the right of way

"may be used for purposes of a public nature."

This language is separated from the remainder of the paragraph by a semi-colon; and the further provisions are set out after the words

"and such rights of way may be used," etc.

Therefore, by the clearest and most elementary rules of statutory construction the privileges are disjunctive and separate, and the rights of way under the act of March 3, 1891,

"may be used for purposes of a public nature."

That is, for any public purpose, and there is no limitation on such public uses, and the amendment therefore broadly includes the public purposes for which the right of way in-

volved in this case are admittedly used. In fact, any use of water under the laws of Utah is a public use.

After the amendment of 1898, however, the department continuing its previous policy of narrowing and limiting the act, held that maps of rights of way could be approved only under the original act and although rights of way approved under the original act might be used for the purposes indicated in the amendment, they could only be approved under the original act for purposes of irrigation.

Our contention is that the rights of way mentioned in the original act are by the clear and compelling language of the amendment made to include any public purpose to which it is desired to devote the same, and that whenever Congress said that rights of way could be used for a certain purpose, it was not to be held to be guilty of the absurdity that they could not be acquired for the purpose for which their use was recognized, but that it is all too plain and clear that they could be acquired and used for all of the purposes stated in the original act and in the amendments thereof, and that any other construction does obvious violence to the intentions of Congress, and the language of the act, and that the rights here involved are clearly covered by the original act, and all of these uses being of a public nature, are clearly included in the amendment of the act.

Taking the Act in its entirety, together with its amendments, it is as broad as the Act of 1866 and was



intended to give to an appropriator of water for any beneficial use, the privilege of having his maps approved and noted on the plats in the Local Land Office, that is, on surveyed lands, at any time prior to the conveyance of the land by the Government, and thus to give notice to the purchaser of the land from the Government that it was covered by the right of way, and could only be disposed of subject thereto.

When we consider that in the original act there is no language that attempts to limit the use to which the rights of way may be put, but only the character of the corporation authorized to file a map of its right of way, and when we consider that the express language of the act later removes this limitation and requires its application to all owners of ditches, whether constructed by corporations, individuals or associations of individuals without regard to purposes, we see no escape from the construction that the provisions of the act are open to all corporations, individuals or associations of individuals and for all lawful purposes.

The act grants nothing except the privilege of filing maps in the Land Office. The right vests by virtue of construction and use under the local laws and in no other way.

But even if it were conceded, for purposes of argument, that rights of way are granted by the act, there is

no better settled rule of construction than the one that holds that where a legislative body has previously passed an act, and where that act has been construed and applied by the court of final jurisdiction, and where thereafter the legislature passes another act substantially similar, the later act is passed with the expectation and intention that it shall receive the same construction as the former act. In this connection we invite the Court's attention to the railroad right of way act approved March 3, 1875, 18 U. S. Stats. at L., Ch. 152, p. 482. It would not aid the Court, we assume, for us to review the two acts and point out their similarities and to point out that there are no substantial differences, but that the later act is obviously based upon and adopted in consonance with and intended to serve, with relation to the rights granted by the later act, the same purposes as the former act with respect to the rights of way there granted. It may be possible to suggest incidental or trivial differences, but we can confidently submit that there are no real or substantial differences between the two acts, and obviously Congress, in adopting the previous act as the basis of this act, intended that it should receive a similar construction.

The former act (approved March 3, 1875) was construed by the Supreme Court of the United States in the case of *Jamestown and Northern Railroad Company v.*

*Jones*, 177 U. S. 125. The whole scope of this decision is covered by the syllabus, as follows:

"A definite location of the right of way of a railroad, which will entitle it to the benefits of the act of Congress of March 3, 1875, granting lands to railroads, is made by the actual construction of the road, although a profile map of the road has not been filed."

In this case it appears that the rights of way were selected, located and occupied with the knowledge and acquiescence of the department, and it is not claimed that they are located in any way detrimental to the public lands and their uses. Therefore, the appellant, under the act referred to, made definite location of its rights of way by the actual construction of its canals and connected uses, and the filing of the map is not at all essential to the validity of its rights, but if filed would merely have the effect to give notice on the Land Office records.

We quote from the decision above referred to (*Jamestown*, etc., v. *Jones*, 177 U. S. 125):

"It (the act) enables the railroad company to secure the grant by an actual construction of its road or in advance of construction by filing a map as provided in Section 4," etc.

The same questions were considered and the same conclusions were reached by this Court in the later case of

*Stalker v. O. S. L. R. R. Co.*, 225 U. S. 142, also in *Minidoka & S. W. Ry. Co. v. United States*, 235 U. S. 211.

In the case of *Cache Valley Canal Co.*, decided in 1893, 16 L. D. 192, Secretary Noble, in refusing to approve a map on unsurveyed land, held:

"Sections 2339 and 2340, R. S. secures the company, however, in its right in said unapproved portion of said canal and reservoir, as these sections are not repealed or amended by the act of March 3, 1891."

In *Lincoln County Co. v. Big Sandy Co.*, decided in 1904, 32 L. D. 463, Secretary Hitchcock, at page 465, said:

"While the clause above quoted from section 20 of the act of March 3, 1891, extends the benefits of that act to all canals, ditches or reservoirs, theretofore constructed upon the public domain, among which is the right to file in that behalf with the land department a map of such canals, ditches or reservoirs and secure the approval of the Secretary of the Interior thereof, yet the rights of claimants under Section 2339 of the Revised Statutes are in nowise dependent upon said act or upon an approval of such maps. (See *Santa Fe Pacific R. R. Company*, 29 L. D. 213.) The purpose of the act of March 3, 1891, in respect to this, was primarily to extend to such claimants the right to place their claims of record with the land department for their better protection. It may be, too, that it enlarged the privileges conferred by Section 2339 of the Revised Statutes, in that it gave the right to the use of fifty feet of land on each side of the marginal limits of canals, ditches and reservoirs—a privilege not carried by said section—but, however, this may be, it surely did not operate to make

the continued enjoyment or rights conferred by said section dependent upon the filings of the maps provided for in the act."

In *De Weese v. Henry Investment Company*, 39 L. D. 27, June 8, 1910, it was held that (Syllabus):

"Rights of way for reservoir sites under the act of March 3, 1891, may be acquired by actual occupancy and development on the ground; and a mere application and map, unless followed with reasonable diligence by actual development and use, is no bar to appropriation of the site by another who proceeds with diligence to development and utilization thereof."

And at page 33, the "decision" says:

"\* \* \* the right may be obtained by construction without filing of a map at all, \* \* \* The filing of a map is requisite only to protect the grantee from claims by other parties. *Battlement Reservoir Company*, 29 L. D. 112."

#### CONSIDERING THE ACT APPROVED MAY 14, 1896.

Reference to the act of January 21, 1895, is here omitted as of no direct importance in connection with the matters here being considered. The act, however, of May 14, 1896, in its title purports to be an amendment of the act of March 3rd, 1891, while in its body it amends the act of January 21, 1895, by way of adding a new and independent section thereto numbered Section 2.

Upon its face the obvious purpose of this act was to authorize the privilege to construct transmission lines, power houses and other necessary structures in connec-

tion with the development of hydro-electric power on the public lands of the United States.

The legislation is new in its nature, and provides for the occupation of areas not exceeding forty acres, and rights of way to the extent of twenty-five feet, which would be presumably adequate for transmission lines, but in most instances wholly inadequate for canals.

It seems obvious that the purpose of this act was to make clear the right to certain necessary and additional uses in connection with power developments, but that it was not thought or designed in any manner to have it relate to or repeal or limit any existing rights, grants, uses or privileges on the public lands.

Later, however, the act has been so construed that it has been held in the Eighth Appellate Circuit that it took the place of the act of 1866 in so far as hydro-electric power was concerned.

Since this decision of the Eighth Circuit was the basis of authority for the judgment in this case, and since it is our purpose definitely but briefly to review and consider this opinion and in that connection to consider the effect of this act of May 14, 1896, and also and in the same connection, the act of February 15, 1901, we will defer at this time further discussion of this act, believing that it can be more clearly and satisfactorily presented in that connection.

## CONSIDERING THE ACT OF JUNE 4, 1897.

The provisions referred to are contained in the Sundry Civil Bill for the fiscal year ending June 30, 1898, and are set forth in full so far as applicable to this controversy in this brief.

These provisions, being provisions for the establishment of forest reservations and defining the purposes, uses and regulations in connection therewith, should be read and considered in their entirety.

It should be kept clearly in mind that the legislation was designed as substantive legislation, to authorize the establishment of forest reservations for certain designated purposes and covering the authority to adopt rules and regulations relative thereto, and the rights to the uses and enjoyments thereover. And this legislation should therefore be read into and considered in connection with any act recognizing rights of way, including rights of way over forest reservations, and defining the nature and extent of the rules and regulations that could be adopted in connection with allowing or approving such rights of way. Apparently, in the adoption of the rules and regulations which we have hereinbefore considered and which we will later review, the departments, both in adopting such rules and regulations and in construing the law or laws of Congress, have wholly ignored these very definite and important provisions directly applicable to the situation here under consideration.



We first call the Court's attention to the Congressional declaration as to the purposes for which forest reserves could be established. We quote as follows:

*"No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States: but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purpose, than for forest purposes."*

It will here be seen that no forest reserve could be established or continued except for the purposes clearly stated, that is to say, the primary purpose was, of course, to protect the forest within the reservation, this for the purpose "of securing favorable conditions of water flow" and "to furnish a continuous supply of timber for the use and necessities of citizens of the United States."

Obviously and undeniably, these are the only purposes for which forest reserves can be created or administered, and, as we shall later show, the rules of the department must all be in aid of and none thereof in derogation of these purposes. We may here also observe that it is clear enough that the securing of favorable conditions of water flow was for the highly proper purpose of securing a full and regular supply of water for the use of

the lands and the inhabitants tributary thereto. This purpose is made more clear by later provisions of the act.

The next quotation is of even more significance, and illustrates the earnest purpose of Congress to limit the undue assumptions of the departments and to restrain the making of restrictive and inconsistent rules. We quote:

"And he (referring to the Secretary of the Interior) may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests therein from destruction;"

and, following:

"nor shall anything herein prohibit any person from entering upon such forest reservation for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof, provided that such persons comply with the rules and regulations covering such forest reservations."

And we further quote:

"All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

It is thus clearly provided that the waters may be used either under the laws of the State or of the United States. The obvious purpose being to recognize as is else-

where done in this and nearly all other acts of Congress, the control of the respective States over the appropriation and beneficial use of water and to refer to the laws of the United States with relation to the use of necessary rights of way therefor, the laws of both being referred to in connection with what was designed to be the free, harmonious and full use of the waters developed and flowing within such reservation.

Language could not have been used to make more clear the purpose and intention of Congress that one of the important and prime purposes of the forest reserves was to secure favorable conditions of water flow, and that such water flow, developed and flowing within such reservations was to be free and accessible to the inhabitants of the respective States within which such reserves are situated, for all lawful and beneficial purposes.

Thus understood, the provisions of the act of 1866 and the acts in aid of and supplemental thereto were by Congress continued and made applicable within forest reserves, and no act of Congress has ever been adopted modifying this clear and defined policy.

Nor should any act of Congress, including the act of 1901, have ever been construed in any way inconsistent with these permanently declared purposes and fully recognized rights, nor should any rules or regulations ever have been adopted restrictive of or limiting or placing

charges or burdens upon the exercise of these clearly stated and well defined rights.

In some of the briefs that have been filed in this and related cases, it has even been suggested that the declaration with respect to the right to appropriate and use the waters within such reservations have no relation to rights of way necessary to such uses. Since, however, the United States was expressly not legislating with respect to the right of appropriation and beneficial use of water, but was expressly deferring to the States in that regard, and was expressly recognizing the sole authority of the State in that regard, and was providing that the waters might be appropriated and used, it could have had reference only to the rights of way over the Government lands necessary therefor and this argument would apparently be quite sufficiently self-destructive. In truth, so far as the water itself is concerned, the United States, by universal consent recognized and recognizes the right of the State to the appropriation, and use of this water so that the language here under consideration to have any scope or effect at all, must be understood as applying to the use and occupation of the forest reserves and to the use and occupation of the necessary rights of way over the public lands therein, and the Congress, in referring to such use, did not of course refer to the undisputed right of the State to use the water under its laws, but did

refer to the incidental thing, the rights of way without which it could not be appropriated or used at all, and to make this clear it is made subject to use under the laws of the State, or under the laws of the United States, which of course and of necessity relate to rights of way, since the United States never did claim or assert any authority over the water itself and necessarily, where it was providing for the use of waters, it was referring to the only thing that it even claimed to even regulate, the rights of way over the public lands essential to such uses. Thus understood, the act of May 14, 1896, and the act of February 15, 1901, must be construed as in aid of and not in conflict with this right.

CONSIDERING THE ACT APPROVED FEBRUARY  
15, 1901.

The act of 1901 was intended to give to the Secretary of the Interior authority to approve applications for reservations for rights of way for the various purposes mentioned in the act, for some of which he had held he did not have authority to approve such maps without this legislation. It must be read in connection with the other legislation and harmonized with it if possible. It does not profess to repeal any act, nor is it, when rightly construed, inconsistent with any prior act on the subject. It was intended to put all the uses and rights of way mentioned on practically the same footing, and not to

encumber the public land with any reservation which could not be canceled by the Secretary if not utilized, without the necessity of resorting to judicial proceedings. For this reason, the proviso was added to the act that the permission of the Secretary should not be held to confer any right or easement or interest in the land. So construed, this proviso recognizes the true rule that such right can only arise by reason of construction and use, that is to say, by appropriation and not by grant.

If the construction contended for by the appellee in this case is correct, namely, that it takes the place of all prior legislation on the subjects covered by the act, and that no rights of way can be obtained without the consent of the Secretary, under whatever rules, regulations and requirements he may see fit to adopt, within his arbitrary discretion, it is clearly a delegation of legislative power to the Secretary, and is, therefore, unconstitutional and void, but the Act should be construed, if possible, so as to render it constitutional and this may be done logically, rationally and in harmony with all other acts on the subject in the manner herein suggested.

Stripped of unnecessary verbiage and given only its natural construction, the act of 1901 is a very simple enactment. Presuming, as we should, that it was adopted consistent with existing laws and in aid thereof, and not

in repeal of the same, it has the effect and the effect only of authorizing the Secretary of the Interior

"under general regulations to be fixed by him to permit the use of rights of way through the public lands, forest and other reservations," etc.

for all necessary aqueducts, ways and uses for the appropriation and beneficial use of water to the extent of the ground occupied, and not to exceed fifty feet on each side of the marginal limits thereof, or in certain instances not exceeding fifty feet on each side of the center line of the occupancy referred to, and providing that such permit should be allowed only upon a finding of the departmental authority that the same is not incompatible with the public interest, with the further proviso that any "permission" given by the Secretary may be revoked by him, and shall not be held to confer any right or easement. The scope and extent of these provisions we shall consider later.

It has been assumed in certain arguments and in some opinions that the design of this act of Congress was that the Federal Government should take over and in a sovereign and governmental sense safeguard and control the public lands in connection with such uses, and also with the object in view to reserve and assert governmental authority over the industries developed in connection with these uses.



We submit that no sound argument can be made in support of this contention and absolutely no decisions of this Court warranting or justifying any such a view can be found. We further submit that most of these assumptions involve considerations that are void and unconstitutional, and therefore cannot be assumed as having been in contemplation.

Historically, if that be of importance, it is true that there had been much public agitation and some controversy in Congress as to the disposition of the public lands in the way of railroad grants and other disposition of the same, and therefore it is argued that there was in this act an intentional reversal of policy.

This contention and consideration strangely overlooks that the whole controversy and contention was and had been with relation to the disposition of the public lands.

Not the slightest objection or controversy had arisen over any evils resulting from the uses of ways and easements. Volumes of objections had been made in connection with railroad land grants and other acts disposing of the public lands. But no one had ever, so far as we have been able to ascertain, asserted any objections to the granting of rights of way even for railroads. Much less had there ever been any objection to any rights, easements or privileges recognized by the act of 1866, or otherwise over the

public lands. No objections had been or ever have been made that any of the uses or easements recognized by this act for the appropriation or beneficial use of water should not have been recognized or that the same had worked any hurt or harm to the public interest.

The whole assumption of any situation or contention that the right of way laws or right of way privileges for ways, easements or uses over the public lands had been abused or had been harmful or were really objectionable, is absolutely non-existent.

These rights of way always have been, then were and now are a constitutional right of the States and the people of the States wherein the public lands are situated. As a matter of history, in all of the States they have been freely taken and without interruption enjoyed, and there never had arisen any real question as to the propriety of allowing such uses, neither had there been nor was there any objection that in practice these ways and easements had been harmfully used, or that they had been used to the prejudice of the public interest or harmfully with relation to the proprietary interests of the United States in the public lands.

Considered only with relation to questions of public policy, the public lands were then, and always have been and now are disposed of for the same price and without deduction for such ways and uses, and the value, salability

and ready disposition of these lands for settlement and development had always necessarily been enhanced and improved by the construction of ways and uses and water developments in and through the States wherein such public lands were situated.

To impute to Congress any intention to modify or repeal these wholesome laws, or to nullify the wholesome conditions that had always prevailed with respect to such uses, would be wholly contrary to anything that had occurred in Congress or that was expressed either in debate or enactment of Congress. And further than this, such an assumption is directly in the teeth of and wholly contrary to the decisions of this Court wherein it is held that the original act of 1866, recognizing and confirming such rights of way for the beneficial use of water, was simply a recognition of a pre-existing right and confirmatory thereof.

The only sentence in the act of 1901 that could be distorted into any implied assumption of any intention on the part of Congress of going further than to authorize the adoption of regulations designed to provide departmental control over the location of such rights of way, so that they should be used consistent with the proprietary interest of the government in the lands so occupied, and to adjust such uses consistent with the purposes of the government in our parks and reservations, is the provision for a finding that such permit

"is not incompatible with the public interest."

It will be found upon investigation, however, that the attempt to consider this language in the sense that it relates to the public interest in the appropriation of the water and the development of the uses and public services connected therewith, has no support in the enactment considered in its entirety.

The public interest referred to is necessarily, for several reasons, the so-called public or proprietary interest of the United States Government in the public lands. It will be observed that this clause relates only to instances where the uses permitted are through any of said parks, military, Indian or other reservations, and while the uses are to be permitted through the public lands generally, as well as the parks and reservations referred to, if the public interest referred to had related to the exercise of governmental authority in connection with the public interest relative to the appropriation of such water and the development and uses and public service connected therewith, then of course the proviso would have related to such uses upon the public lands as well as within the parks and reservations.

Therefore, where the reservation relates only to a finding that the same is not incompatible with the public interest within said parks, forest, military, Indian or other reservations and not to the public lands outside of

the same, clearly the public interest referred to is the public interest in said parks, forest, military, Indian or other reservations, and not the public interest in connection with the appropriation of the water and the development of the public uses and services connected therewith. This construction appears to us to be clearly correct and compelled by the reading of the act.

Further, any other construction is prohibited by the consideration that the United States Government as a proprietor of public lands had the right to consider the interests of the government in the parks, forests, military, Indian and other reservations referred to, but it had no right in dealing with such proprietary interest and in the rights of way connected therewith to safeguard or assume the powers of the State to determine whether such developments were compatible with the public interest or not. That is a subject wholly without its jurisdiction and wholly reserved to and belonging to the State. And even the power which it may be conceded Congress intended to confer could not be exercised by the United States so as to deny the right to the use and enjoyment of such essential ways and uses, nor to impede or prevent the development of the State or its resources, but to the end only that in the location and use of the same due and reasonable regard shall be paid to such parks, forests, military, Indian, or other reservations.

This brings up again the question of paramount importance which has already been stated and which arises in connection with almost every phase of this controversy, namely, whether or not the United States has any larger or greater governmental powers in States wherein it owns land than it has in the other States of the Union. We may concede, *arguendo*, that the United States may, through its own rules and regulations, protect its proprietary interest in the public lands and in the location of ways and uses thereover, but to project the contention or the argument further and claim that the United States Government may in a sovereign and controlling way determine whether such uses may be enjoyed at all or not, or whether such uses are necessary or compatible with the public interest, is to take away and paralyze the power of the State and confer upon the Federal Government as a landed proprietor the right to permit or prohibit the development of the State's resources at all. Each State, with relation to lands other than those held by the Federal Government, may determine all questions pertaining to ways and uses for public interests and public purposes, and compel the landed proprietor to submit to the same, and provide rules for the regulation and location of such ways and uses and compensation therefor.

To bestow upon the United States Government a

different and sovereign right, and to permit it to determine whether the public interest requires such development or not, and as to whether its land shall be subject to such essential ways and uses, would be to confer a power upon it inconsistent with and contrary to the Constitution, and to deprive each of the States within which public lands are situated of the essential and indispensable right of determining the necessity of such uses and when their necessity is determined, to provide for their establishment and maintenance and the conditions under which they shall operate.

If the right to exercise its judgment and discretion existing in all other instances is taken away from the State and conferred upon the United States Government, not only will infinite harm result but the public land States will be placed upon an intolerable inequality with the other States of the Union. All of which we may submit is contrary to decided law, contrary to the principles of the Constitution, and arising out of no necessity; and the allowance of such a contention could do nobody any good and result only in infinite and unnecessary controversy and harm.

The further construction of this act has been contended for that, inasmuch as it is provided that any permission given by the Secretary may be revoked by him and shall not be held to confer any right or easement or interest in or over the public lands, all water developments



and public uses under this act, even after the water right is vested under the State laws, and even after a public use has been established by the expenditure of millions of dollars, are held subject to the power of the Secretary, at any time, and with no other reason therefor except the mere exercise of arbitrary power, to revoke the permit, destroy the water right, destroy and forfeit the investment and effectually prevent and destroy the public service.

Strange to say, this construction has been carried into all departmental rulings as far as we have observed, and is embodied in the rules and regulations under consideration in this case.

With all due respect, we could conceive of no construction that would be more contrary to sound principles or more unnecessary than this construction.

In the first place the language is that the *permission* may be revoked and shall not be construed to confer any right or easement. Nowhere is it stated or intimated that no rights can be acquired by proceedings taken and developments made under the permission.

There have been, as is well known, some instances where acts of Congress have been construed as conferring vested rights and interests in the public lands, although such rights of way have not been accepted or used; and it has been found necessary to bring actions to have such rights of way annulled and forfeited. Under these cir-

cumstances it was an entirely proper thing for the Congress to say that the permission—meaning, of course, where the right of way permitted had not been occupied or used—should give no right or easement or interest in the public lands, thus avoiding the necessity of a suit to annul an unused permitted right of way, but wherever the proceeding to be taken or the use to be made of an easement or right of way, is in its nature permanent and where it requires and implies the expenditure of large sums of money for permanent improvements, and where other property rights are acquired dependent upon such easement or right of way, and in a still more compelling sense where it is designed to develop an essential, permanent use or enjoyment, and especially where such use or enjoyment is or may be a public use and public service, then and in all such instances the use of such an easement is for obvious reasons held to be permanent and irrevocable, and any provision looking to its termination must be so definite and clear that no other construction is possible. And in the instance where the easement and right of way is designed and used for an important and permanent public service, then any provision for the termination of such an easement and the destruction of such public service is necessarily null and void, and could not be enforced in any event. And, as we shall later show, even if the Congress had inserted a provision that,

after the permission had been acted upon, and after the water right had vested, and after the investment had been made, and after an important and essential public service had been established, as is the situation in this case, such permission could be revoked and the permittee ejected from such easement and right of way, the water right forfeited and the public use terminated, it is all too obvious upon both principle and authority that such a proviso would have been absolutely and necessarily null and void.

We will further and separately discuss this subject and cite the authorities on this point as soon as we have concluded the direct discussion of the effect and construction of the act of 1901. It is sufficient to say here that we think that standing alone this one consideration under the facts in this case would be wholly preventive of any recovery by the appellee or the entry of any decree ejecting appellant from the rights and uses in question and enjoining their use, and thereby in effect prohibiting and enjoining the public service. No such power may be exercised in any State by any proprietor or under any pretext, because it is in undeniable conflict with the rights of the State to maintain and perpetuate and compel to be maintained and perpetuated its public uses and public service.

THE ACT OF 1901 WAS DESIGNED TO  
LEAVE IN FULL FORCE AND EFFECT ALL

EXISTING LAWS AS TO RIGHTS OF WAY OVER  
THE PUBLIC LANDS.

CONSIDERED AS A SUBSTITUTE FOR  
OTHER LAWS, AND AS PROVIDING THE ONLY  
METHOD UNDER WHICH RIGHTS OF WAY  
COULD BE OBTAINED, ACQUIRED OR USED  
OVER THE PUBLIC LANDS FOR THE PURPOSES  
INDICATED, THE ACT WOULD BE AND IS  
CLEARLY UNCONSTITUTIONAL AND OF NO  
EFFECT.

It will first be observed that the act does not confer upon any State or any citizen or association or corporation any rights, privileges or opportunities whatever.

It is, and if considered alone amounts only to a delegation of power to the Secretary of the Interior to give or refuse permission for occupancy in the instance referred to, and as construed by the Department, of a purely temporary nature (unless other laws or rules of law are considered), and that the power so conferred is and would be in its nature purely arbitrary and no citizen, association or corporation, or even any State, would have a right to acquire, develop or use any rights of way whatsoever except dependent entirely upon the discretion or arbitrary conclusion of the Secretary.

That such a so-called enactment would be no law at all and entirely void is, we think, elementary in our system of government.

In the first place we must consider that under the well settled decisions of this Court, the several States and

the citizens and associations and corporations authorized by its laws, have the undeniable right to such uses and ways for the development of its resources. The matter was stated by this Court in *Withers v. Buckley*, 20 How. 84, from which we have already quoted. Referring to the act of Congress of March 1st, 1817, in prescribing the navigation of the Mississippi River, this Court said, with relation to the act, that it

"Could not have been designed to inhibit the power inseparable from every sovereign or efficient government, to devise and to execute measures for the improvement of the State."

And again, in the same opinion,

"It cannot be imputed to Congress that they ever designed to forbid, or to withhold from the State of Mississippi, the power of improving the interior of the State, by means either of roads or canals," etc.

And again,

"Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied,"

And again,

"Obviously, and it may be said primarily, among the incidents of that equality, is the right to make improvements in the rivers, water courses, and highways, situated within the State."

Therefore, we are authorized by this Court to say that in the passage of the act of 1901 it cannot be imputed to Congress that it intended to confer upon the Secretary of the Interior the absolute power to permit or refuse or to allow upon such unrestrained terms as he might dictate, the improvement of the rivers and water courses and highways situated within all the public land States.

And it may be added that if it could be imputed to Congress that it attempted to do so, that its right to so legislate could be confidently denied.

Congress may pass any desired constitutional legislation, and it may, for instance, allow and prescribe that the executive department of the government shall ascertain certain facts or conditions as a condition precedent to the enforcement of the law. But the Congress cannot by a bald delegation of power to the executive department, without any law on the subject and without defining or conferring any right, permit any branch of the executive department of the government to in effect exercise the legislative power by simply exercising the arbitrary power conferred upon it, either to give or withhold a right as in its judgment and discretion may seem expedient.

When we further consider that the act is with relation to uses and easements which have been held by this Court to be pre-existing rights in the States and in the people for the development of their resources, and that the

previous acts of Congress under consideration have been held merely confirmatory of such pre-existing rights, we are confronted with a peculiarly impossible legal situation, namely, that this authority is assumed to have been conferred upon an executive branch of the government without any rule of law to require the exercise of the same, and not only not in aid of or for the enforcement of such previous laws, but conferring the discretionary power not only to deny any use or procedure under such laws, but to deny absolutely to the States and to the people of the States all or any right either under such laws or the pre-existing rights of the States and of the people as defined by this Court.

The Congress can make laws, rules or regulations concerning public lands, and after making such laws it can confer supervisory power upon the executive department to make rules and regulations for the enforcement and carrying into effect of the same, but the Congress cannot divest itself of its constitutional power and duty to make such laws, rules and regulations by merely conferring upon an executive department of the government (with no right or privilege in any State or citizen) power to either permit or refuse such essential ways and uses over the public lands. In other words, by such a procedure the executive department would at once become the law-making and the law-enforcing power, and the enact-



ment of Congress would consist solely of the delegation of such power to make or not to make a law of the executive department, and with the power in the executive department to enforce or not to enforce the law.

The first article in the Constitution of the United States provides that all legislative power therein granted shall be vested in the Congress of the United States, which shall consist of a Senate and a House of Representatives.

The provision dealing with the public lands is that the Congress may make rules and regulations concerning the public lands and other property of the United States. Therefore, unless the act of 1901 relates to the enforcement and administration of existing laws of Congress, it is clearly unconstitutional and void.

In considering this subject, namely, the power of Congress to delegate its authority to the President, Mr. Justice Harlan in expressing the opinion of the Court in *Field v. Clark*, 143 U. S. 649, while holding that the regulations concerning the tariff there authorized were not the making of a law but the mere delegation of proper supervisory power, observed, quoting from page 692:

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of Government ordained by the Constitution,"

and after observing that Congress itself had prescribed

in advance the duties to be levied, collected and paid, etc., the Court said:

"Nothing involving the expediency or the just operation of such legislation was left to the determination of the President,"

and,

"As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. *What the President was required to do was simply in execution of the act of Congress.*" \* \* \* "He was the mere agent of the law-making department to ascertain and declare the event upon which its express will was to take effect," etc.

The entire opinion is clear and instructive upon this point.

Chief Justice Fuller and Justice Lamar dissented from the portion of the opinion wherein it was held that the authority conferred upon the President was not the delegation, even in this instance, of legislative power.

See also *Yick Wo v. Hopkins*, 118 U. S. 356, at p. 369, where this Court held that there is no room in our governmental system for the exercise of arbitrary power;

and *Haupt v. Ind. Del. M. Co.*, 25 Mont. 122; 63 Pac. 1033, at p. 1035, where the Court said:

"By discretion is meant sound discretion guided by law."

The only theory upon which the act of 1901 can be sustained is that the other laws and statutes of the United States are in full force and effect, and that the limitations upon the rules that may be made by the department, and the purposes for which forest reserves are created, are also in full force and effect.

If considered with application and with reference to established rights and principles and the acts of Congress, the act may be given the supervisory force referred to; otherwise, we submit that it has no force or effect and is unconstitutional and void upon its face.

The act stands alone. It refers to no other law, and it does not indicate the intention to repeal or modify any other law, and it does not purport to be a part of and it does not refer to any act, and does not of itself contain any legislation or grant or withhold any right, and therefore it is necessarily null and void, unless it is construed to be a mere authorization whereby the uses and privileges provided by the other acts of Congress may be enforced and put into effect, and whereby reasonable rules for the location and construction of the same may be adopted and enforced. But it cannot possibly be anything more

than this, and if it is attempted to assert that it is, a reading and consideration of the act will demonstrate that it is clearly unconstitutional and void.

Obviously if this act could be construed as standing alone and not with relation to other laws concerning the rights of way and uses referred to over the public lands and, nevertheless, be held to be Constitutional, such holding would unavoidably have to be predicated on a construction of the act to the effect that the rights of way referred to for the uses to be permitted were recognized and confirmed pursuant to the intention of the act and the Secretary was, as a result of the express and implied provisions of the act, directed and required to permit and allow the enjoyment of such rights of way and uses. That is to say, that there must be carried into the act by implication a provision similar to the expression that rights of way of the character described and to be permitted and used are recognized and confirmed and the permission, subject to general regulations, is to be allowed and approved by the Secretary accordingly.

Unless such implication by construction is read into the act it is clearly and unavoidably, we believe, a delegation without reservation of the power of Congress, whereby the Secretary is authorized either to allow or refuse the uses and rights of way referred to. And such an act and such a construction is clearly obnoxious to Constitutional principles.

If construed in this way it would be equally clear that the rules and regulations of the Secretary must be consistent with, and in aid of and not restrictive of the rights of those who are to enjoy the privileges of the act and not such as to place any burdens, limitations, charges or restrictions thereon not clearly authorized by and consistent with the language and purpose of the act.

If construed in this way the act would probably not be different in its construction or effect in any very material respect from its purpose and effect if it is regarded as designed only to confer a supervisory power in the Secretary over the location and uses of such rights of way under existing laws of Congress. But it is submitted that unless the act can be construed as indicated or unless it is merely designed as regulative of existing rights of way laws and the location of the use to be enjoyed thereunder it is clearly obnoxious to Constitutional principles as a delegation of legislative power to an executive department, and this regardless of the question elsewhere considered as to whether such regulative authority in the manner and form asserted is vested in the Congress or not.

#### ACT OF JUNE 17, 1902.

We have already completed a review of all of the acts of Congress that seem to have any direct bearing on the controversy here, but in passing we call attention

to the act above mentioned, usually referred to as the "Reclamation Act." It is important to observe that this act was passed after the passage of the act of 1896, and also after the passage of the act of February 15, 1901, and that it contains the provision that,

"Nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, \* \* \* "

We have also already called attention to the act of June 21, 1906, 34th Stat. at L. 325, 375, making an appropriation for irrigation systems in certain Indian Reservations in the State of Utah, wherein it was specifically provided that the water therefor should be appropriated under the laws of the State of Utah.

THE RIGHTS HERE ENJOYED ARE IRREVOCABLE AND THE APPELLANT CANNOT BE ENJOINED IN THE USE THEREOF FOR THE REASON THAT SUCH USE IS PERMANENT IN ITS NATURE, THAT WATER RIGHTS HAVE VESTED THEREUNDER, AND THAT AN INDISPENSABLE PUBLIC SERVICE HAS BEEN DEVELOPED AND MUST BE CONTINUED; NOR CAN A LICENSE BE REVOKED AFTER EXPENDITURES MADE IN RELIANCE THEREON BY THE LICENSEE WHERE THE USE IS IN ITS NATURE PERMANENT.

The rights above asserted are, we submit, a sufficient defense to this action and require a reversal of the decree in this cause, because of the constitutional rights of the appellant, because of the enactments of Congress, and because of the existence of a public service in connection therewith which cannot be enjoined and which the State may compel to be continued.

Since the rights here involved are inseparably connected with the public service and are indispensable thereto, it will be unnecessary for us to discuss at length or to cite the authorities that would be applicable if the public service was not involved.

However, preliminary to presenting the considerations of the public service which we deem conclusive of the entire case, we will state the principles and cite the authorities that relate to permanent improvements and uses of this character, regardless of the connected public service.

The following considerations must be kept in mind, that it is contemplated that water will be appropriated and water rights acquired and applied to beneficial uses under the State laws; that the title of the appropriator and his right to the enjoyment of the water, is dependent upon the continued beneficial use; and that these developments usually necessitate large and sometimes enormous investments of capital, the construction of dams and per-



manent diverting works and of canals and aqueducts and connected power houses, power transmission lines and such other necessary works as are ordinarily essential to irrigation or hydro-electric water developments.

Looked at from any and every point of view, the developments contemplated are in their nature indispensably permanent and imply such investments of capital and the acquisition and perpetual use of such property and property rights and the development of such industries, that no one of sound mind could contemplate any other theory than that of permanency and practical perpetuity.

In all such cases, permits or agreements or contracts under which developments of this character are made, are always presumed to imply and express the understanding of a continuation of the occupancy and use, either perpetual or in any event so long as the necessities of the situation may require.

Parties acting only in their private relationship might by clear and unequivocal language written into a contract provide for a termination of such use and enjoyment even under circumstances where a perpetual right would be implied. But such termination is never implied, except where expressed by clear and unambiguous language, and where no other rational construction is available.

However, when we come to deal with the establishment of a public use and a public necessity, such as the

construction and service of a railroad, or irrigation canal, power development and transmission, telephone or telegraph service, or any like public service, then the parties contracting with relation to essential occupancies, easements, uses and rights of way, are not permitted to contract for the termination of such essential ways and uses, for any such contract interrupting the public use would be null and void as against the public right and necessity.

Also, in the absence of any contract and where the entry is by license or acquiescence or otherwise, and where the public service is essentially involved, the occupancy and right are of necessity held to be perpetual, and the license or permit cannot be revoked or the public service destroyed.

These considerations are elementary, unavoidable, and, so far as we know, of universal application, and we shall first briefly cite the authorities as to the construction of contracts, agreements, licenses, or statutes or ordinances under which uses, although private in their nature, are sought to be terminated after the entry has been made and the business or industry established, and large investments have been made which would be destroyed or greatly impaired by the revocation. The general rule is stated in Domat's Civil Law, pt. 1, bk. 1, tit. 12, Sec. 4, Art. 1, as follows:

"The proprietor of the land or tenement which serves is bound to suffer the use of the service, and

can do nothing which may either hinder the said use or diminish it, or render it inconvenient, and he ought to change nothing in the ancient condition of the places nor in anything else necessary to the service."

See also *Campbell v. Ind. and Vincennes R. Co.*, 110 Ind. 490, 11 N. E. 482, 483:

"Where a parole license has been given, upon the faith of which moneys have been expended, the licensor and those claiming under him, with notice, will be stopped from revoking such license, where the license cannot be placed in *statu quo*."

Also see *N. O. J. & G. N. R. Co., v. Moyle, Admr.*, etc., 39 Miss. 374, 386:

"But it was a mere license or permission, revocable at any period unless where such revocation would operate as a fraud or injury upon the party to whom it was granted; and not depending on any consideration to support it more than any other executed gratuity or gift. The case here is even stronger than this for plaintiff in error, for this is not an action to enforce a contract but a defense to an action of trespass for doing what this evidence shows plaintiff below permitted and licensed to be done. It was not an action to charge any person, but a defense to discharge the defendant below from a trespass."

*Rio Grande R. R. v. Brownsville*, 45 Texas, 88, 96:

"If they may revoke such consent, which, however, we are not called upon to decide in this case, it should appear it was done, and notice of it given to the company before any action was had or expendi-

ture was made on the faith of the consent or agreement."

*Chicago M. G. L. & F. Co. v. Town of Lake*, 130 Ill. 42; 22 N. E. 616, 617:

"And the same result is reached when, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner so that to revoke it would be inequitable and unjust."

*State (Hudson Tel. Co.) v. Mayor, etc. of Jersey City*, 49 N. J. Law, 303, 8 Atl. Rep. 123, 124:

"The notion that a corporation which, under provisions similar to the present act, has, upon the strength of a *permission* to use a certain route, spent thousands of dollars—in erecting posts and stretching wires is at the mercy of the city authorities continually and entirely is not to be entertained for a moment. A view that the rights of the corporation are of so unsubstantial a character is opposed to all judicial sentiment from the Dartmouth College case—to the present time."

*City of Barre v. Perry and Scribner*, 82 Vt. 301; 73 Atl. 574, 577:

"That a license which has been acted upon cannot be so revoked as to deprive the licensee, of the benefit of his expenditures."

*Harvey v. Aurora & G. Ry.*, 186 Ill. 283; 57 N.E. 857 at 860:

"Where a license is acted upon in a substantial manner so that to revoke it would be inequitable, or

unjust or where it is for an adequate consideration accepted by the grantee it becomes a binding contract."

*Nat'l W. W. Co. v. Kansas City*, 65 Fed. 691, 694,  
where Justice Brewer said:

"The rule is recognized in this State as elsewhere, that where one party enters upon the real estate of another under a parol license from the latter, and at large expense constructs an improvement which is necessary for the successful carrying on of the business of the licensee the licensor is estopped to deny the right of the licensee to continue such occupation and use so long as the necessities of his business require."

*Hare v. Wallace*, 2 Am. Lead. Cases (5th Ed.) 569,  
commenting on *Rerick v. Kern*, 14 Serg. & R. 267.

"From the cases which have been cited we may deduce two things—A license cannot be revoked or withdrawn so long as it is essential to the possession or enjoyment of a vested right or interest which has been created by the licensor or placed with his assent in a situation where the continuance of the license is essential to its enjoyment. These inferences obviously result from the general rule that no one can recall a promise or declaration made with a view to influence the course of another after he has acted upon it and thus placed himself in a position where he must necessarily suffer if it be withdrawn. An equitable estoppel arises under these circumstances to prevent the legal title from being used as a means of injustice."

*Stevens v. City of Muskegon*, 111 Mich. 72; 69 N. W.  
229:

"It is of little moment what name we give the right conveyed, whether an easement or an irrevocable license. It was known to the parties that plaintiff must incur great expenses, and it would be absurd to hold that he and the city had entered into this arrangement for their mutual benefit with the understanding that the city might at any time revoke it and impose the entire loss upon the plaintiff. \* \* \* With these restrictions the plaintiff obtained a vested right to the use of his property. To hold otherwise would be a reproach upon the law."

*People v. Blocki*, 203 Ill. 363; 67 N. E. 809, 812:

"If the *permits* amounted to no more than a license when acted upon by the construction of the switches they became binding upon the municipality they are binding upon the appellant."

*Savage v. City of Salem*, 23 Ore. 381; 31 Pac. 832,

833.

"The rule seems to be that after a municipality has granted a license or franchise to a private person or corporation to occupy a portion of a street for public purposes and the licensee has acted upon such grant and expended money on the faith thereof the city cannot revoke the license without compensation to the owner."

*Everett v. City of Marquette*, 53 Mich. 450; 19 N. W.

140, 141:

"If the permission was a mere license and the subsequent action of the city council is to be regarded as a revocation of the license, it does not follow that

the plaintiff has, by the revocation, immediately been converted into a wrong doer."

*Clark v. Glidden*, 50 Vt. 702; 15 Atl. 358, 361.

"In Ang. Water-courses 318, it is said that, in equity, licenses executed are taken out of the statute of frauds, and that relief may be had in equitable tribunals by the licensee. This is not upon the ground that the right passes by parol license or agreement but that where one party has executed it by payment or agreement, taking possession and making valuable improvements the conscience of the other is bound to carry it into execution."

*Rerick v. Kern*, 14 Serg & Rawles, 267, at 271-2:

"With this qualification, it may safely be affirmed, that expending money or labor in consequence of a license to divert a water course, or use a water power in a particular way, has the effect of turning such license into an agreement that will be executed in equity." p. 272.

"But a license may become an agreement on valuable consideration, as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived." (Gibson, C. J.)

*Morton Brewing Co. v. Morton*, 47 N. J. Eq. 158; 20 Atl. 286-9.



When the plaintiff, acting in its capacity as a proprietor of public lands, deals with a citizen and in like manner invites and assents to the utilization of a part of its lands for the erection of structures thereon for some purpose desired and encouraged by Congress in the public interests, the relations created are no different from those that might for a like purpose be established between private individuals.

In the case of *U. S. v. Baltimore & Ohio R. R. Co.*, 24 Fed. Cas. page 973, Case No. 14, 510; 1 Hughes 138, the District Court of the United States for the District of Virginia held that the Baltimore & Ohio R. R. Company, having constructed its railroad across the military reservation at Harper's Ferry, in compliance with the express consent of the Secretary of War, theretofore duly authorized to sell and dispose of the premises, thereby acquired a vested right to remain so long as necessary for the purpose for which it was constructed. The Court used the following language:

"This conclusion brings me to notice briefly the rights acquired by the defendant under this agreement. Under the permission granted in this agreement, the railroad company entered upon and took possession of the disputed property, and constructed their line of railway across it. The license granted was for an indefinite period, no time being fixed when the permission to use the lands for the purpose specified in the agreement was to terminate. Up to this

time it has never been revoked, nor has any notice been given by the government of its intention or even its desire to revoke it, until the institution of this suit. The defendant accepted this license upon the terms indicated. It built and constructed its railroad under this authority. It was the extension of a great national highway, and as we now know, second to none in magnitude and importance in this or any other country. It must have been apparent to both the contracting parties that an enterprise at that time so stupendous in its character as the construction of a Railroad from Baltimore to the Ohio River, was to be permanent and lasting. A right thus acquired, under a written license not specially restricted, is commensurate with the thing of which the license is an accessory. That it was so understood by the secretary of war is shown by the fact that he expressly provided in his agreement with the defendant that 'the said company shall allow the United States to construct and keep up forever a depot, with suitable tracks, switches and turnabouts, to be connected with said road.' Here there is a reservation of a right forever upon the part of the agent of the government, clearly indicating that he understood that the defendant was to use and enjoy the license thus granted as long as it should see proper to do so. The inference is clear to my mind that it was the intention of the secretary of war to dedicate the property granted under this license to this specific use which was a public one. It was for a great national highway. Having so donated and declared the purposes and object of the donation, it became dedicated to the specific purposes indicated. By this act, upon the part of the United States, through their agent, the defendant, as well as the public through it, has acquired an easement in the property, so long as it continues to use it for the purposes granted, which is

said 'to be a liberty, privilege, or advantage which one may have in the lands of another without profit.' The owner of the fee, whoever he may be, cannot revoke the license granted. The fee will remain in the original owner, or his grantees, but the right of the defendant to the use is paramount to the title of the owner of the fee, and does not require the fee for its protection. *Trustees of M. E. Church v. Mayor, etc. of Hoboken*, 22 N. J. Law, 13; *Wilson v. Sexon*, 27 Iowa 15. \* \* \*

"And here the doctrine of equitable estoppel may be justly applied. Under the permission given, the defendant built its railroad over the land of the complainants, with their knowledge and assent, which depend for its value on remaining in its present position. Acting in good faith it was influenced to make large expenditures both of time and money in its construction. The plaintiffs were influenced in granting the license by the benefits to be derived from the construction of the road in furnishing them with better facilities of transportation at reduced rates. It was simply the advantage of a railroad for transportation over the old wagon roads, which, in the light of subsequent events, proved to be of incalculable benefit to the property. The benefits thus derived, whilst they may not amount to a valuable consideration, were the inducements that operated upon the complainants to grant the license. It was a power coupled with an interest, which was both necessary to the possession and enjoyment of the rights acquired under the permission, and it is not revocable as long as the interests exists. Were it otherwise, a revocation of the power would follow, and the defendant would be constrained to remove its railroad at a great loss. Such a result would work gross injustice to the defendant, and would allow the complainants to take advantage of their own wrong. It is here that equity

interposes her power to estop the complainant from disturbing the defendant in the rights acquired by it under the agreement, otherwise, it would have no remedy. It is now the settled doctrine that 'equity will execute every agreement, for the breach of which damages may be recovered, when an action for damages would be an inadequate remedy.' In this case no adequate compensation could be made the defendant for the damages it would sustain by the revocation of its license and the loss of rights acquired under it. The complainant having without objection permitted the defendant to construct over their lands a public railroad, 'cannot, after the road is completed, or large expenditures have been made thereon, upon the faith of their apparent acquiescence, reclaim the land or enjoin its use by the railroad company.' *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio St. 169; *Cumberland Val. R. Co. v. McLanahan*, 59 Pa. St. 24, 31. And this doctrine is reaffirmed in 21 Ohio St. 553, in which case the learned court declares that 'it is the dictate of natural justice that he who, having a right or interest, by his conduct, influences another to act on the faith of its non-existence, or that it will not be asserted, shall not be allowed afterwards to maintain it to his prejudice.' Out of this just principle has grown the equitable doctrine of *estoppel in pais*, so well stated and strongly approved by *Fonblanque* in his treatise on equity (Colume 1, c. 3 Sec. 4); by *Chancellor Kent* in *Wendell v. Van Rensselaer*, 1 Johns Ch. 344; by Lord Macclesfield in the leading case of *Savage v. Foster*, 9 Mod. 35.

"In the case under consideration no one can question the fact that the defendant was influenced in the course it pursued by the conduct of the government through its officer, the secretary of war. The company entered upon the premises under its agreement with the government, and remained in the peaceable

possession and the quiet enjoyment of them for a period of upwards of thirty years. During all this time not the slightest intimation was ever given to it of any claim whatever upon the part of the Government in the disputed premises. I therefore conclude that, upon every principle, both legal and equitable, the complainants cannot and ought not be permitted at this late day to disturb the defendant in the possession of the premises under the agreement of 1838. Nor do I think a right of compensation exists in this case. No actual consideration is expressed in the agreement and the omission to do so implies that both parties understood that none was demanded. It is manifest that the secretary of war required no consideration for the reason that he looked to the additional facilities of transportation, the construction of the railroad would furnish, as well as to the enhanced value of the residue of the property consequent upon its construction. It seems to me, therefore, that every consideration of justice between the parties requires me to treat and hold the license in this case as an executed contract giving an absolute right."

The doctrine of executed easements is the application by the Court of equity of the principles of equitable estoppel.

In *Hemmer v. U. S.*, 204 Fed. 898 (C. C. A. 8th Circ.), Judge Sanborn held the United States to be equitably estopped by an offer made to settlers in an act of Congress. He said (p. 902) :

"By its offer by the Act of 1875 of the title to and the full power of disposition of this land, at the end of ten years, in consideration of its occupation and cultivation for five years, the United States induced

Taylor to earn it and the grantees under him to buy and pay for it, and it ought to be estopped now from repudiating or modifying its offer and representations to their injury."

See also:

*United States v. Willamette, Etc. R. Co.*, 54 Fed. 807.

*Walker v. United States*, 139 Fed. 409.

*State of Indiana v. Milk*, 11 Fed. 398.

*State of Michigan v. Railroad Co.*, 69 Fed. 116.

*State of Iowa v. Carr*, 191 Fed. 257.

*State of Iowa v. Trust Co.*, 191 Fed. 270.

There is an established line of cases which hold that in matters of contract between the United States and private citizens, the same rules govern the interpretation and enforcement of such contracts as will prevail between citizens.

In *Hollerbach v. U. S.*, 233 U. S. 165, at 171, the Court says:

"A government contract should be interpreted as a contract between individuals with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument."

In *United States v. Stage Co.*, 199 U. S. 414, at 423, the Court said:

"The same principles of right and justice which prevail between individuals should control in the con-

struction and carrying out of contracts between the government and individuals."

To the same effect see:

*U. S. v. Barlow*, 184 U. S. 123, 136;  
*U. S. v. Bostwick*, 94 U. S. 53, 66;  
*U. S. v. State National Bank*, 96 U. S. 30, 36;  
*Smoot's case*, 15 Wall. 37, 47;  
*Mountain Copper Co. v. U. S.*, 142 Fed. 625, 629.

In *Texas & St. L. R. Co. v. Jarrell*, 60 Tex, 268, there was an action of trespass to try title, in which Jarrell recovered and the railroad company appealed. The Court held, p. 270:

"Under the facts disclosed as to the agreement in reference to the right of way, and as to the actual entry by appellant under such agreement and the things transpiring between the parties after the entry, we are of the opinion that matters had reached a stage at which this agreement, or license to enter, could not be entirely revoked, and that in reason, as well as on the authority of like cases, we could not maintain the action of ejectment under the circumstances for the purpose of recovering from the appellant the strip in question used by them for operating their road through his land. *Mills on Eminent Domain*, Sec. 142, and cases cited in notes thereto; *Provolt v. Ch. R. & Pac. R. R. Co.*, 9 Am. Ry. Rep. 161, same case, 57 Mo. 256. \* \* \*

The Court should have given in some form the substance of the special charge asked by the appellant to the effect that, though the appellee did not make an express contract giving to appellant the right of way, yet if he had knowledge that appellant had entered on



his land for the purpose of constructing its railroad bed there, and that trees were then being removed for the purpose of preparing the right of way for grading, and by his acts ratified the same, and by not demanding prepayment of damages, or dissenting in some other manner, and informing the agents of appellant that he would make no further objection and that they might proceed with the work, and did in fact allow them to proceed, without further opposition, that such acts or acquiescence of his amounted practically to a consent on his part for appellee to proceed."

*Taylor v. Chicago, M. & St. P. R. Co.*, 63 Wis. 327; 28 N. W. 84. The action was ejectment to recover possession of land on which it had constructed its line with the owner's consent. Referring to several earlier cases, the Court held:

"The strong intimation made in these cases, that when the railroad company has entered upon the lands of the citizen with his express or implied consent and constructed its railroad upon the same, without first making compensation therefor, that such consent to permanent occupation is a waiver of his constitutional right to compensation before possession taken, and having thus waived such constitutional right he also waives his common law rights of action to obtain the same, and is restricted to the proceedings prescribed by the statute, has since been, by the decision of this court, declared to be the law governing the rights of the parties in such cases. \* \* \*

And whenever the proofs in a common law action brought by the owner of the lands to recover damages, or the possession of lands taken and used by a railroad company, show that the possession of the plain-

tiff's property by the railroad has been taken, and its railroad has been constructed thereon, with the express or implied assent of the plaintiff, the plaintiff fails to show himself entitled to recover in such actions; and it can make no difference as to his right to maintain the same whether it be an action of trespass to recover damages for the wrong done, or ejectment to recover the property so taken and occupied by the company."

In *Baltimore and Hanover Railroad v. Algive*, 63 Md. 319, there was oral license to build the road, given by an owner who afterward revoked the license and brought ejectment. The Court held, p. 324:

"The appellant had the right under its charter to acquire the right of way in controversy by condemnation, and inasmuch as proceedings for that purpose were dispensed with by reason of the consent of the appellee to the construction of the road through his land, such proceedings may still be instituted by the appellant, and pending these proceedings a court of equity would restrain the appellee from interfering with the appellant in the use and enjoyment of the right of way."

This principle was recognized by this Court in the case of *Jennison v. Kirk*, already cited and quoted from.

This question of the effect of repeal of a statute under which title to property vested was fully considered in *Fletcher v. Peck*, 6 Cranch 87, 135, wherein the Court held:

"The past cannot be recalled by the most absolute power. Conveyances have been made, those convey-

ances have vested legal estates, and, if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest these rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? \* \* \*

"A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs nothing from a grant." (p. 137.)

The principle that a proprietor of land could not, after permitting the construction of an irrigation canal thereover, although the right of way had not been acquired by deed or otherwise, and the statute of limitations had not run, revoke the permission and eject the canal therefrom, thus shutting off irrigation from a farming neighborhood, was fully sustained in the leading case in California of *Crescent Canal Co. v. Montgomery*, 143 Cal. 348; 76 Pac. 1032.

This same principle was again considered and broadly decided in the late case of *Barton v. Riverside Water Co.*, 155 Cal. 509, 515; 101 Pac. 790.

And the same principle was again fully considered and applied to the effort to eject or interfere with a power transmission line conveying power for the public service in the case of *Guernsey v. No. Cal. Power Co.*, 160 Cal. 699; 117 Pac. 906.

This principle was by this Court applied to railroads and rights of way therefor in the case of *Roberts v. N. P. R. R. Co.*, 158 U. S., p. 1, opinion by Justice Shiras, holding that the owner having permitted the intervention of the public service, was restricted to a suit for damages.

A similar decision was rendered in the case of *N. P. R. R. Co. v. Smith*, 171 U. S. 260. We call especial attention to the language used on pages 271, et seq.

A strong case in this Court on this principle is the case of *N. Y. City v. Pine*, 185 U. S. 93. This was an action by a riparian owner, and in his opinion in this case, Mr. Justice Brewer assumed that the City of New York could not have condemned the right to appropriate this water but held that, having permitted matters to proceed as far as they had gone, he could not be permitted to interfere with the public rights and interests. (See *Donohoe v. R. R. Co.*, 214 U. S. 499.)

Referring to the case of *New York City v. Pine*, it was said in the case of *Kamper v. City of Chicago*, 215 Fed. 706, on page 708, that

"In *New York City v. Pine*, supra, the bill to enjoin the city from diverting water from complainant's premises was filed before any diversion had occurred. And so the bill appealed to equity's jurisdiction to prevent a threatened trespass. But even so the mandatory injunction of the Circuit Court was reversed for the purpose of restricting complainant to an assessment of damages either in an action at law or in the pending suit wherein the jurisdiction in equity had been seasonably invoked. Here, however, the bill was not filed until the public work had been devoted to public use for 15 years; and so the bill cannot properly be retained for any purpose."

See also:

- Eastern Oregon Land Co. v. Des Chutes R. R. Co.*, 213 Fed. 897;
- Miocene Ditch Co. v. Jacobsen*, 146 Fed. 680;
- Cowley v. City of Spokane*, 99 Fed. 840 (C. C. Wash., 1900);
- Ryan v. Wesier Valley Land and Water Co.*, 20 Idaho, 288; 118 Pac. 769;
- Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384; 105 Pac. 1070;
- McCann v. Chasm Power Co.*, 211 N. Y. 301; 105 N. E. 416;
- Crescent Mining Co. v. Silver King Min. Co.*, 17 Utah, 444; 54 Pac. 244.

The situation here is that with the acquiescence of the government the purposes of eminent domain have been accomplished. The lands have been occupied and used for the easements and rights of way in question, and the right to the use of the water is vested and the public service is in full operation.

The effect of the decree in this case is to cancel the vested rights, eject the appellant from the easements and rights of way in question, destroy the property investments made thereon, and interrupt and destroy the public service.

Such a proceeding and such a result are justified by no necessity, supported by no reason, and sustained by no law. The controlling, if not the sole reason assigned by the Appellate Court, of the Eighth Circuit, for a similar decision in the case we will hereafter review, was that some right of government went with the public lands of the United States, and if the rights of way and uses had vested, that some power of government had been taken away. We will discuss this question in reviewing that opinion, but it is sufficient to say here that the decisions of this Court are many and very clear that no such right of government appertains to the public lands, and since the only reason that could be assigned for holding that a right vested and accrued over the lands of the Federal Government should not be equally protected in the public interest as a similar right accrued and vested over any other lands, no matter by whom owned, could not have any support except in the theory that the government holds these lands in sovereign right and that when the easements were used and vested some power of government had been impaired and taken away, and since it is entirely

clear that this assumption and situation is wholly erroneous, there exists no reason that can be conceived of why the same rules of equity, necessity and justice should not be applied to the lands of the Federal Government that are applied to the lands of all other proprietors.

ARGUMENT AND AUTHORITIES SHOWING  
THAT RULES AND REGULATIONS ADOPTED  
AND SOUGHT TO BE ENFORCED BY THE DE-  
PARTMENTS OF THE INTERIOR AND AGRICUL-  
TURE ARE UNAUTHORIZED BY THE ACT OF  
1901 OR ANY OTHER ACT OF CONGRESS, AND  
ARE ATTEMPTS AT THE EXERCISE OF IN-  
DEPENDENT LEGISLATIVE POWER AND ARE  
NULL AND VOID.

These regulations appear in full in the transcript in this case, and we have already in this brief outlined the more important features of the same.

That these regulations are the attempted exercise of legislative power, and are unauthorized and are not in aid of the act of Congress, but in limitation and restriction thereof, are matters so obvious that if it was not necessary and desirable to consider the principles involved in connection with the same, no extended discussion of these regulations and so-called permit agreements would be justified.

It is clear, we think, that if we have a constitutional government in this country, and if it is the duty of the Congress to enact the laws and the duty of the executive



department to enforce the same, and if regulations must be in aid of the enforcement of the law and not in limitation or prevention thereof, then these regulations are so clearly void as not to be susceptible of any fair argument.

In view of the previous quotations in this brief from the regulations referred to, we will only make at this time such brief and definite references to the same as appear to be of importance and necessary to apply the authorities and point the argument which we shall later make.

Regulation L-4 (Tr. p. 66) is predicated upon the assumption that the act authorizes the secretary to pass upon the question of the beneficial utilization of the resources, including the water right, and its consistency with the public interests and necessities, evidently construing the act as having conferred upon the Secretary, representing the Federal Government, the proprietor of these lands, the power to pass upon these questions; and not regarding the provisions of the act as directing the secretary to consider only the interests of the United States Government and the public in the uses of the parks, reservations, etc.

This, as we have already pointed out, we regard as wholly fallacious, and is a power that Congress could not confer upon the Secretary, and a power that does not belong to the United States as proprietor of the public

lands, but the questions of determining what the public interest is and what constitutes the best beneficial utilization of the resources of a State are questions solely for the State and the people of the State and belong to the State and the people of the State regardless of the ownership by the Federal Government of public lands in any State.

Regulation L-5 (Tr. p. 66-67), recognizes the control of the State over the right of appropriation and beneficial use of the water. Which control, by the way, would be of little value if the Secretary had unrestrained power as supervisor of the public lands to pass upon the question of the beneficial utilization of the water and to determine whether the appropriation and use are consistent with the public interest or not.

Regulation L-6 provides that the permit, unless sooner revoked by the Secretary, shall terminate at the expiration of fifty years from the date of the permit, with provisions for renewal upon notice and application.

This regulation is predicated upon the theory that not only the permit but all water rights and uses required for the public service are continuously subject to the power of the Secretary to revoke the permit and repossess the right of way, forfeit the water right and terminate the public service. Also upon the theory, having no support either in the act or in any other law,

that the United States Government, through the Secretary, may define a term for the use of a right of way after which it shall terminate and revert to the United States Government, thus either forfeiting the water right or vesting it in the United States. And by the same process determining the period during which the appropriator shall enjoy the water right, and the period during which he shall continue in the public service within a State and without the consent of the State, terminating and forfeiting the water right, and also determining the period of either the private or public use of the water right and the enjoyment of the private right, and also the continuation of the public service.

These rules and regulations are upon the broad assumption of unrestrained governmental power of the United States through the public lands, a power not found in the Constitution but exercised as freely over industries and persons operating on the public lands as though express and exceptional power had been granted therefor in the constitution itself, and also equally assuming a lack of power in the State, wherever necessary uses come in contact with the public lands, to develop or provide for the development of its resources or to provide for the character of and the terms under which its public service corporations shall operate, including the terms of existence

and the termination of the life or franchise of such public service corporations.

We assume that these rules, regulations and assumptions need not be separately argued. They cannot possibly stand if the States of this Union are and are to continue equal in right, opportunity and privilege, including the right of development and including the right of control over public service corporations and persons after development is made.

The question is as to whether or not the United States must exercise its powers of government under the constitution, or whether it may do so and exercise other powers through the public lands, and whether by coupling governmental legislation with rules and regulations affecting the public lands it can enjoy and exercise powers that it could not even pretend to assert in a separate act of Congress, passed consistent with its constitutional powers of Government.

Regulation L-7 (Tr. p. 67) provides that:

“ ‘Municipal purposes’ means and includes all purposes within municipal powers as defined by the charter of the municipal corporation, where any such purpose is directly pursued by the municipal corporation itself with the primary object of promoting the security, health, good government, or general convenience of its inhabitants.”

It will thus be seen that whether the "municipal purposes" referred to are within the laws of the State, or even within an act of Congress regarded as such, nevertheless, they would not be municipal purposes within the scope of this executive legislation unless "with the primary object of promoting the security, health, good government or general convenience of its inhabitants."

Regulation L-7, Subdiv. b (Tr. p. 68) provides for a deduction from the total capacity (hydraulic capacity) of the power site, which is due to the use of stream flow made available by the portion of project works not on the lands of the United States, which makes clear that the charge is to be estimated upon the potential capacity of the water for the development of power.

Regulation L-8 (Tr. p. 69) provides for a charge for the use of the rights amounting to ten cents per h. p. for the first calendar year, and then increasing at the rate of ten cents per h. p. per annum to one dollar per h. p. for each h. p. developed.

It will be kept in mind in this connection that the Secretary by Congress is merely authorized to permit the uses, and no suggestion is made authorizing the imposition of any charge, so that if the Secretary may impose this charge and if such imposition and regulation is valid, then there can be no limitation upon his discretion, and the amount charged could be measured by dollars instead

of cents, or the sum imposed could be obviously sufficient to prohibit the use of any such rights of way or the development of any water resources thereunder.

Also, if such a charge can be imposed upon the use of water, then any desired charge can be imposed, either measured by the mileage of the transmission line, or by the power transmitted over the line, or under similar legislation, in the case of telephone or telegraph lines, measured by the receipts from the service, or if applied to railroad right of way, although wholly unauthorized or unmentioned by Congress, it would permit the imposition of a charge of so much per ton per mile for all freight transported over the right of way, so that very luxurious sources and opportunities are proposed to be opened up for the collection of excise charges and revenues by the Federal Government without even Congressional authorization therefor. Such a departure is certainly worthy of the careful consideration of this Court, if not of its approbation.

Where the charge is measured by the product of an industry, it is of course an excise tax, and the Congress itself could impose no such tax except uniformly throughout the United States in accordance with the provisions of the constitution. And if under the subterfuge of the public lands the Congress measures its charges for the use of the same by the electrical energy developed, the

water conveyed or the freight carried or the product of the industry, a definite provision of the constitution would be suspended and would become totally inoperative in the public land States, and all of them, so far as related to any industries conducted upon, over or in connection with the public lands.

We may submit that the imposition of this or any other charge is wholly unauthorized by Congress, and also that the Congress itself could impose no such charge as is proposed in this instance, ascertained in such a way and manner as to constitute in actual operation and effect an excise charge and nothing but an excise charge.

Following the provision as to the charges imposed are elaborate provisions for adjustments of charges, all in the judgment and discretion of the Secretary. This is also followed (Tr. p. 70) by a statutory enactment of the department exempting municipal corporations from any charges for municipal purposes. Also providing exemptions for irrigation works and providing for proportionate exemptions where uses partly for municipal purposes and partly for other purposes, or partly for irrigation or partly for other purposes. Which discrimination invites the suggestion that if the Secretary happened to be opposed to municipal ownership he could provide that any municipality, instead of being exempted, should pay ten times as much as any other user. So we are



contemplating not only a suspension of the constitution with regard to excise taxes and their equality throughout the United States, but we are also contemplating a method whereby a law of Congress (without any authorization to make any charge) can be absolutely suspended and also a device in connection with which the civic ideas of the Secretary with relation to public or private ownership can be asserted and the industries of a State compelled to submit to the will and the legislative judgment of the executive Secretary.

Further (Tr. p. 70), it is provided that if the rental charge is due and unpaid, the permits shall terminate, and become void. This sounds innocent enough, but it means that if the right of way is used in connection with the public service that the power may be shut off and the public service destroyed.

Further (Tr. p. 70), there is an elaborate provision for re-adjustment which is too long to be copied, but which when read will demonstrate that it is one of the most curiously devised processes for the raising and adjusting of revenue and the equalizing and the distribution of the charges and burdens of taxation that was ever devised by the mind of man; with a provision, however, that must have had its origin before the establishment of any government of law, that

"the decision of the secretary shall be final as to all matters of fact upon which the calculation of the capacities or rentals depends."

There are other provisions of interest, but not of importance justifying comment, until we read Regulation L-13, which provides for a stipulation binding the permittee to the regulations enumerated in L-14, and

"such other conditions as may be required."

Regulation L-14 provides that permits for occupancy and uses for power purposes shall be allowed upon the following conditions "and not otherwise," and

"those conditions shall also apply to all existing permits in which the occupancy and use of national forest land is conditioned upon the compliance by the permittee with the regulations of the secretary as at any time existing."

Converted into direct English, the foregoing means that any corporation or association that has the temerity to develop a power industry on the public lands under the laws of the State shall be subject to all such regulations of the department as now exist or that at any time in the future may be adopted; that is to say, subjected to all regulations now or heretofore or hereafter made from the beginning of the world to the end thereof.

Regulation L-14, Subdiv. F. provides for the installation of measuring devices and reports, and G. for the

examination of books and accounts, and H. for the maintenance of a system of accounting, and Regulation R. requires the permittee to obey the laws of the State within which the service is rendered, thus assuming that the State is unable to enforce its own laws.

Subdivision S of Regulation L-14 contains more original legislative enactments on more varied subjects, not only for the use and benefit of the Federal Government, but for the several public land States than was ever embodied in any previous enactments.

Stated as succinctly as we can, it provides for the surrender of the permit to the United States upon demand in writing, and therewith to give, grant and transfer, etc., all of the works, equipments, structures and property then owned or held and then valuable or serviceable in the generation or distribution of electrical or other power or which are then dependent in whole or in part for their usefulness upon the continuance of the permit, together with all interest in any leaseholds or operating property used in connection with the works under permit, and all contracts for the same.

The Secretary may take over the property for the United States, or he may designate a State or municipal corporation "which shall desire such transfer." Just why the Secretary does not compel the State or municipal corporation to take over the property whether it desires

it or not, is unexplained. There is also an unexplained provision that no municipal corporation should be designated unless it has been adjudicated to have the right to acquire such property elsewhere than on the national forest land. The conditions are that the United States shall pay to the permittee the reasonable value of all of said works, and in addition thereto a bonus of three-fourths of one per cent for each full year of the unexpired term of the permit.

The value, however, shall not include any sum for the permit or franchise or right granted by the United States or by any State or municipal corporation in excess of the amount actually paid therefor, nor shall it include any other intangible values

“it being the intention of this paragraph that all such intangible values shall be covered by the bonus herein provided for.”

It will be observed that if taken over at the end of the permitted period that the bonus and the so-called intangible values will have both disappeared.

A process of valuation is provided for with an arbitration board.

“If necessary one of the arbitrators shall be named by the permittee, and one by the transferee, and the third shall be the secretary or some representative whom he may name;”

which seems to be a very modest way whereby the Secretary will assume the duties of the United States Government and of the State or States within which the properties are situated, and of the courts in determining the questions and valuations in eminent domain, and with the two interested parties sitting around, and with the Nation and the States and the courts having nothing to do, the Secretary will adjudicate and determine all of these questions in accordance with the rules and regulations and system of valuation provided for at any time within the Secretary's discretion.

We pause here to call attention to the fact that the United States Government was created for the common defense and general welfare, with power to regulate commerce between the States. And with no powers or duties except such as are delegated to it by the terms of the constitution.

Questions of great importance may arise as to how far the respective States, in the absence of specified constitutional authorization, may engage in industrial business or enterprises. Without digressing to discuss the latter subject here, it may be pointed out that the Minnesota Supreme Court in the case of *Rippe v. Becker*, 56 Minn. 100; 57 N. W. 331, held that the State of Minnesota, merely because it possessed the power of regulation, could not engage in the grain or elevator business. And in

connection with the South Carolina experiment of engaging in the retail liquor business as a dispensary thereof, the Supreme Court of that State has held in *MacCullough v. Brown*, 41 So. Carolina, 220; 19 S. E. 458, that the law was invalid. Later, when the court had been changed, by divided opinion, the Court held that inasmuch as intoxicating liquors were dangerous to society and were not placed on the same footing with ordinary commodities, that the State power over intoxicants being absolute, it could assume entire control over it, even when trade was one of the incidents in such control. That Court, however, concurred with the Minnesota Court, that the State could not engage in ordinary private industries merely because it had the power of regulation thereover.

This same conclusion was stated by the Supreme Court of Massachusetts, in answer to an interrogatory from the legislature, *Commonwealth v. Galligan*, 155 Mass. 598. In that opinion the matter was stated in this way:

"There are nowhere in the constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at the time when the constitution was adopted was usually bought and sold by individuals and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The object of the constitution was to protect rather than to authorize the commonwealth or the 'towns, parishes, precincts and other bodies

politic' to undertake what had usually been left to the private enterprise of individuals."

When, however, we revert to the Constitution of the United States and consider the purposes for which the Federal Government was created, and the scope and limitation of its powers, and the reserved powers of the State, it appears to be a strange hallucination of constitutional law that the United States within a State could take over and operate an industrial enterprise. This would be true of any industrial enterprise, but it would be doubly true in connection with the character of enterprise we are considering, constituting in all important instances a public service.

Even outside of and beyond the obvious constitutional considerations that would prevent the Federal Government engaging in such industrial enterprises within the State (especially where not connected with interstate commerce), it is clearly discernible that the result would be to reduce to chaos and inextricable confusion the constitutional limitations with respect to the equal powers of the Federal Government in all the States, and its power subject to the rule of uniformity to collect revenues and excise taxes throughout the United States.

Subdivision T of this regulation is designed, as we read it, to protect municipal corporations in the acquisition of its properties upon terms which are approved by the Secretary.



Subdivision U of this regulation is in the form of an enactment of comprehensive legislation as to any interstate monopolies or "within any one State," with respect to the generation, sale or distribution of electric energy or other power.

By Regulation L-17, it is provided that the permit may be transferred to a new permittee

"under the following conditions and not otherwise," the conditions being set forth. Which means, of course, that the owner of a public service property within a State, no matter how vast, may not sell or dispose of his properties, although the State law permits, or even directs, without the approval of the Secretary, because without the permitted use the property would be valueless.

Regulation L-19 provides for revocation for any violation of the permit. It also points out

"That any permit given by the Secretary of the Interior (Agriculture) under the provisions of this act may be revoked by him or his successor in his discretion."

The effect of this construction and regulation has already been fully discussed in a previous subdivision of this brief.

In the leading case of *Pollard's Lessee v. Hagan*, already extensively quoted from in this brief, it is asserted by this Court:

"AND, IF AN EXPRESS STIPULATION HAD BEEN INSERTED IN THE AGREEMENT, GRANTING THE MUNICIPAL RIGHT OF SOVEREIGNTY, AND EMINENT DOMAIN, TO THE UNITED STATES, SUCH STIPULATION WOULD HAVE BEEN VOID AND INOPERATIVE, BECAUSE THE UNITED STATES HAVE NO CONSTITUTIONAL CAPACITY TO EXERCISE MUNICIPAL JURISDICTION, SOVEREIGNTY OR EMINENT DOMAIN WITHIN THE LIMITS OF A STATE OR ELSEWHERE, EXCEPT IN THE CASES IN WHICH IT IS EXPRESSLY GRANTED."

Notwithstanding this apparently comprehensive statement by this Court, and many other later ones of like import, we find that by Subdivision S of Regulation L-14, the Secretary of the Interior or of Agriculture provides and sets up in each of the public land States, and as to any industries or properties occupying any part of said public lands, an elaborate system of eminent domain, not only establishing the right of acquisition of properties so held by the United States or by the State itself or by a municipality or an authorized corporation, but providing the procedure, process and tribunal for estimating the values of these properties held and owned under the laws of the State, and providing for the exclusion of certain valuations and the allowance of others; in other words, a complete enactment, establishing the right and process and valuations of the property acquired in eminent domain, regardless of any supposed

right of any State to regulate these things for itself, and notwithstanding that many of the States have laws that such properties in the public service may not be sold or transferred or sold or agreed to be sold or transferred without the authority of the State, the Secretary proposes that they shall agree to transfer their properties wholly off of and disconnected with the public lands and constituting a public service, whether the State approves or not.

We desire to argue all cases with moderation and respect, but it hardly seems possible to us that any judge or lawyer, comprehending and understanding in an ordinary way our constitutional scheme of government and the solidarity, beauty and universality of the system sought to be established thereunder, could consider unauthorized provisions emanating from a department of this government so wholly disregardful of constitutional limitations, without some sense of humiliation. The scheme wholly disregards the exclusive powers of Congress and treats as of no significance the most elementary provisions of constitutional law, and the most elementary limitations upon executive authority, and the most simple and elementary rights of the respective States to take care of their own internal affairs without restraint or interference from the Federal Government, much less without any such unauthorized interference from an un-

authorized executive secretary of the Federal Government, who cannot pretend to be acting under any authority of Congress whatever.

It is equally clear as a direct matter of constitutional law that the United States could not exercise or enforce any such governmental, municipal power within any State as it is that the Secretary cannot do so without the authority of Congress.

It is hard to understand how or through what process of reasoning these rules were evolved, or assumed to be authorized. Even if the power conferred upon the Secretary by the act of 1901 was an absolute power and even if he had the absolute right to close the public lands in every one of the States wherein they are situated from all or any uses for the appropriation or beneficial use of water, or for telephone or telegraph lines, or for other uses referred to in that act, and even if it followed that the possessor of such arbitrary power could impose any condition or even any charge that he might desire upon the privilege of enjoying the right that he had the arbitrary power to refuse, nevertheless, all of these considerations would not imply or permit the enactment of provisions or the adoption of regulations amounting to State laws, regulative of the acquisition of property between the State and its citizens or agencies and other citizens or agencies of the same State, or any

other provisions amounting to legislative enactments, and having no justifiable connection with the permitted use of the rights of way in question.

In their completed finality these regulations pass all legal understanding or belief, and no one familiar with our form of government would have believed that anything of the kind could ever have been perpetrated by an official of the Federal Government, except that they are presented to us in such a way that there is no denying that the attempt has actually been made, and the result is asserted as a condition for the enjoyment of the uses and easements over the public lands referred to.

Not only are these rules we are considering not authorized, but no rules are authorized by any act of Congress except rules and regulations consistent with the policy of the law, and imposing no burdens not provided for upon the enjoyment of the same, and which do not limit, modify or withhold the benefits of the law from the citizens or other persons or associations or corporate bodies entitled to the enjoyment of the same.

This principle is well illustrated by the decision in *Morrill v. Jones*, 106 U. S. 466. Section 2505 R. S. provided that:

"Animals alive, specially imported for breeding purposes, from beyond the sea, shall be admitted free (of duty) upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe."

The Secretary of the Treasury, being supersensitive apparently for the improvement of our breeds of stock, provided a regulation that before a collector should admit such animals free he must be satisfied that the animals are of superior stock, adapted to improving the breed in the United States.

Mr. Jones imported a non-pedigreed animal that in the collector's judgment did not appear to be of superior stock adapted to improving the breed in this country, and he imposed the duty which Jones paid under protest and sued to recover the duty. He obtained a judgment, and the Court held:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. \* \* \* We are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. This is not the office of a treasury regulation."

In the somewhat recent and important case of *Williamson v. United States*, 207 U. S. 425, there was a conviction on an indictment for conspiracy by subornation of perjury to defraud the United States of public land in entries under a timber and stone land purchase.

The regulations required certain affidavits and proof of certain matters that were not called for by the statute, although they were obviously far more germane to the law than the regulations we are here considering. In disposing of the matter, this Court held, p. 461-2, as follows:

"It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the act of Congress must be considered as having expressly excluded in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it. As observed in *Adams v. Church* (193 U. S. 510) at page 517: 'To sustain the contention \* \* \* would be to incorporate \* \* \* prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.' True it is that in the concluding portion of Sec. 3 \* \* \* it is provided that 'effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.' But this power must in the nature of things be considered as authorizing the Commissioner of the General Land Office to adopt rules and regulations



for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power to virtually adopt rules and regulations destructive of rights which Congress had conferred. As then there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant \* \* \* and therefore that error was committed."

In the case of the *United States v. George*, 228 U. S. 14, in connection with a regulation that in effect required three witnesses where the statute only required two, this Court used the following language:

"It was testimony exacted in pursuance of this regulation and in the manner directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant was required to testify as other witnesses, in other words, three witnesses were required; Sec. 2291 requires two only and, as we have said, points out what proof, in addition, the claimant himself shall give. It is manifest that the regulation adds a requirement which that section does not, and which is not justified by Section 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation. If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what Sec. 2291 requires, why not other conditions, and the disposition of the public

lands thus be taken from the legislative branch of the government and given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all, it is as broad as its subject and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute.

In *United States v. United Verde Copper Co.* this court considered the power of the Secretary of the Interior under an act of Congress giving the right to cut timber from the public lands for certain purposes, and which were enumerated 'or domestic purposes,' and making the right subject to such rules and regulations as the Secretary of the Interior might prescribe 'for the protection of the timber and of the undergrowth growing on such lands, and for other purposes.' (Italics ours.) The secretary made a regulation which provided, among other things, that no timber should be 'permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.' The justification urged for the regulation was that the word 'domestic' meant household. This court rejected the contention and decided that the regulation transcended the power of the secretary. We said if Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'

In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative

jurisdiction was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is fundamental \* \* \* In illustration we cite *Williamson v. United States*, 207 U. S. 425; *United States v. Keitel*, 211 U. S. 370; *United States v. Eaton*, 144 U. S. 677; *Morrill v. Jones*, 106 U. S. 466; *United States v. Biggs*, 211 U. S. 507."

The revised statute of the United States, Section 2339, imposed no conditions on the enjoyment of the rights provided for except that the ditch or works should be for "mining, agricultural, manufacturing or other purposes," and further provided that

"The possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

The act of 1901 merely authorizes the adoption of general regulations, and we have at sufficient length heretofore fully discussed this act and our views as to the construction of the same and the regulations permissible thereunder.

The language used by this Court in the case of the *United States v. United Verde Copper Co.*, 196 U. S. 207, is very forcible here and very much in point:

" \* \* \* If Rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can abridge, he can enlarge.

Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is given and has entrusted to the Secretary the power to regulate the exercise of the license and not to take it away. There is undoubtedly ambiguity in the words expressing the power, but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them or invest the Secretary of the Interior with the power of legislation."

In the case of *State ex rel. Adamson v. Lafayette Co.*, Ct. 41 Mo. 222, 226, the Court used this language:

"When the law devolves upon an officer the exercise of a discretion it is a sound legal discretion not a capricious, arbitrary or oppressive one. \* \* \* A discretion delegated to an officer is a sound legal discretion, the meaning of which is well known and understood in the law and is not an unlimited license to the officer to act and do as he pleases irrespective of restraint."

We think it is manifest that as to a very great number of these regulations, they are not only wholly foreign to the law, but are entirely without and beyond the powers of Congress or the United States as a government. It is also altogether clear, we think, that in many respects wherein the regulations may have some relevancy or application to the purposes of the law, they involve the assumption of the power of the department to impose charges or conditions, which if the power existed in

the department at all would amount to the power of suspension or prohibition of the operation of the law.

We assume that the government may withhold from private use its land or the proprietary products thereof.

We also assume that it may sell timber or stone or pasturage rights or charge therefor, or it may refrain from disposing of such timber, stone, pasturage or other substances belonging to it as a landed proprietor. We are not here, however, dealing with any such question. We are here considering questions pertaining to ways, easements and uses in all other instances within the powers of the State to control by processes of eminent domain, and with the complete and well recognized right to protect its people in the development of the resources of the State. The right to these uses is also expressly recognized and permitted by the laws of Congress, and for such uses no charge is expressed or implied, nor has any charge therefor ever been imposed or authorized by Congress, to our knowledge.

It is doubtful if even a charge for the mere administrative acts would be allowable. But where the charge consists in the imposition of an excise charge measured by the volume of the product or the income of the industry, then it presents no vestige of implied authority, and becomes a mere arbitrary executive process of raising revenues by imposing conditions upon the operation of

a law that if the right to impose exists at all could be used to the extent of a repeal of the law.

There is, we think, a very direct analogy between a Congressional enactment regulating the occupation and use of easements and essential ways over the public lands, and constitutional authority to occupy the public streets of a city or town. By Section 19 of Article XI of the Constitution of California it was provided in substance that any individual or corporation should have the right to use the streets of any city or town for supplying a city or its inhabitants with water or artificial light. The Constitution provided that such use should be under the direction of the Superintendent of Streets and under general regulations to be prescribed by the municipality as to damages, etc. The authority of the City and Superintendent of Streets in connection with this matter and with general rules and regulations appears to be quite as broad as the authority of the Secretary of the Interior under the laws of Congress. In one of the most important and ably decided cases considered by the Supreme Court of California, Judge Ross, now of the Ninth Circuit, held that the Constitution was self-executing, and that legislative acts of cities, ordinances, rules or regulations, must all be adopted with reference to the purpose of the Constitution to permit and allow such uses and leave them open upon equal terms to all.

*People v. Stephens*, 62 Cal. 209.

This leading case of *People v. Stephens* has been many times referred to in the Supreme Court of California, and in the later decision of *In re Johnson*, 137 Cal. 115; 69 Pac. 973, the Supreme Court of that State said:

"The designation of 'damage and indemnity for damages' as the subject upon which the municipality may prescribe regulations in regard to laying the pipes is a limitation upon its authority over the matter, and a prohibition from prescribing regulations upon any other subject connected with the exercise of the privilege. When the sovereign authority of the State, either in its constitution or through its legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised or enjoyed to impose additional burdens or terms as a condition of its exercise."

We are unable to observe that the laws of Congress any more justify a charge in connection with the use of an easement or necessary way over the public lands than the Constitution of California justifies a charge in connection with the use of the streets referred to, and of course if it had been held that the municipality or the superintendent of streets could have imposed a charge upon the privilege, there being no express authorization therefor and no limitation of the same, the charge could have been made sufficient to amount to a practical or even a total denial of the right.



This provision of the Constitution of California came before this Court in the case of *Russel v. Sebastian*, 233 U. S. 195, and it was there concluded that the right thus granted, where acted upon and accepted, was inconsistent with the later right of the city to limit extensions of the public water service within its municipal boundaries.

The same, if not greater, considerations of public policy are involved here. If the laws of the United States have been acted upon, and if essential uses have been created upon the public lands and have become public uses within the State, it would be against all sound principles of justice and against all reasons of public policy to hold that these could be forfeited or limited by the mere whim or caprice of an executive officer.

We have already stated our views and contentions as to the charge not only being unauthorized by Congress, but that the charge imposed, measured by the potential power of the water and the electricity generated is an excise tax, which the Congress itself would have no right to impose upon the pretext that because the industry was operated upon the public lands, it was subject to such excise charges upon the product thereof as the United States Government might desire to impose.

Such an imposition, whether it be a regulation, or an attempted law of Congress, is, as we have already pointed out, clearly violative of constitutional principles,

and if the practice was extended and allowed, it would leave the door wide open to gross injustice in the imposition of unequal taxes and burdens upon the industries operated in conjunction with the public lands in the public land States.

Article I, Sec. 8 of the *Constitution of the United States*, is as follows:

"That Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and to provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States."

In the case of *Leloup v. Port of Mobile*, 127 U. S. 640, 645, this Court said:

"Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

In the *Head Money Cases*, 112 U. S. 580, 594, this Court said:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform and operates precisely alike in every part of the United States where such passengers can be landed. It is

said that the statute violates the rule of uniformity and the provision of the Constitution that 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another,' because it does not apply to passengers arriving in this country by railroad or other inland mode of conveyance. But the law applies to all *ports* alike and evidently gives no preference to one over another, but is uniform in its operations in all ports of the United States. It may be added that the evil to be remedied has no existence in our inland borders, and immigration in that quarter needed no such regulation. \* \* \* Here there is substantial uniformity within the meaning and the purpose of the constitution."

That the imposition of such a tax is a legislative function see *Providence Bank v. Billings*, 4 Pet. 514, 563, Marshall, C. J. rendering the opinion:

"The power of legislation, and consequently of taxation, operates on all persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature."

After extended argument and consideration, and after several more or less conflicting opinions having been rendered by different Courts of the United States, this

Court has finally determined that the lands of the United States within the several States are not subject to taxation by the States. Notwithstanding this very important question of law and policy has been determined in favor of the United States, it will be observed that the contention is now made, that as a condition of the enjoyment and use of these lands by the States and its agencies, they shall not only be untaxable by the States, but that they shall become a source of independent taxation and revenue for the use and enjoyment of easements and rights of way thereover, measured in the form of an excise tax or charge upon the industry carried on over the public lands. In this instance it takes the form of a charge or excise tax upon the kilowatts of electricity produced and transmitted by the use of the water appropriated under the State laws, but, of course, such a power would include the like right to make a charge measured by the freight transported over a highway or a railroad or based on the quantity of water conveyed through a canal, or its earning power, or by the messages sent over or the income realized from telegraph lines and telephone lines.

These public lands are not only to be held and enjoyed by the United States free of the taxing power of the State while permanently held and rented in a proprietary way and incomes realized therefrom, but it is actually proposed, as above indicated, that these lands

shall become an instrumentality through and by which the Federal Government may realize such unequal excise taxes or proceeds of industries as in its will and judgment shall be right and proper, without any power or control in the State thereover.

In the face of this situation it is of no significance whether or not the tax or income so proposed to be realized is large or small in the first instance, or whether the money so taken by the United States with one hand is returned by the other, nor as to how revenues so realized are to be used or to what purpose they are to be devoted.

If the taxing power exists it is necessarily practically without limitation, and the retention or division of the revenues therefrom or the disposition of the same rests wholly with the United States.

It would be difficult to forecast the evils that would result and the sectional controversies that would arise and the injustice that would be done if this doctrine in connection with charges upon the public land could be upheld so that under the guise of charging for the use, occupation or enjoyment of the public lands, a tax or charge could be imposed upon the water power developed or the water conveyed through a ditch or the freight transported over a railroad or the produce or proceeds of any industry operated upon the public lands. The

theory and policy is clearly violative of the constitutional principles of equal taxation; clearly violative of all just rules of eminent domain; clearly sectional, unequal and unfair, and no policy better calculated to disrupt the unity of the American people, or raise sectional controversies, could possibly be suggested than the approval of the practice that charges for uses or occupations upon the public lands should not only not be free as heretofore, but that the charges should be measured by the valuable product derived therefrom or produced in connection therewith.

The contention that Congress itself could not inaugurate and constitutionally carry out such a policy, is sustained by authority and supported by every reason of constitutional construction and equality of right, and the principle of required equality in sustaining the burdens of government and paying the taxes necessary therefor.

That such a system could not be invented and carried into effect by a bureau of the executive department of the Federal Government, is a matter that we would be willing to submit without argument, were it not necessary and proper to have determined the question as to whether the Congress itself could impose such a charge, which we submit cannot be done.

CERTAIN CASES WHICH ARE CLAIMED TO  
SUSTAIN THE POSITION OF THE GOVERN-  
MENT, CITED AND COMMENTED ON.

It was contended in the court below that the position of the Government was sustained by certain decisions of this Court with special reference to the case of *Light v. United States*, 220 U. S. 523, the case of *United States v. Grimaud*, 220 U. S. 506; and the case of the *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, is frequently referred to as an important authority in favor of the Government in this connection.

So far as the *Light* and *Grimaud* cases are concerned, they involve only the right of the United States to protect from trespassers its proprietary interest in the public lands by its rules and regulations. No questions such as we are here discussing of rights and easements within the eminent domain powers of the State and essential to the public welfare, nor of the imposition of taxes or charges for such uses, nor of the imposition of governmental regulations and powers in connection therewith, were involved. The language used by Mr. Justice Lamar in the *Grimaud* case was exceptionally clear and accurate, and we quote from this opinion as clearly applicable in connection with several questions of importance in the case, not only including the one under discussion, but with respect to the nature and character of the rules which the departments may adopt.

The learned Justice said:

"From the beginning of the government, various acts have been passed conferring upon executive offi-



cers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, etc.

\* \* \*

It was pointed out in the opinion that by certain acts of Congress the Secretary of Agriculture was authorized to make charges for which a revenue from forest sources was expected to be derived. For instance, if wood and other materials were cut or removed, or if stock was pastured on the lands, with relation to such matters the Secretary might impose and collect reasonable charges; and the opinion then proceeds to state the general rules in the following concise language:

"The Secretary of Agriculture could not make rules and regulations for any and every purpose. *Williamson v. United States*, 207 U. S. 462, 52 L., ed. 297, 28 Sup. Ct. Rep. 163. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and harmful uses. He is authorized 'to regulate the occupancy and use and to preserve the forests from destruction.' A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

"The indictment charges, and the demurrer admits, that rule 45 was promulgated for the purpose of regulating the occupancy and use of the public forest reservation and preserving the forest. The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, 'contrary to the laws of the United States and the peace and dignity thereof.' The demurrers should have been overruled. The affirmances by a divided Court heretofore entered are set aside and the judgments in both cases reversed."

Numerous decisions of this Court as to the power of executive officers to make rules and regulations are cited in the *Grimaud* case (pages 519, 520). See also *Field v. Clark*, 143 U. S. 649.

We call especial attention to the words,

"He is required to make provision to protect them from depredations and from harmful uses" and, "He is authorized to regulate the occupancy and use and to preserve the forests from destruction."

These, it will be observed, are each and all proprietary matters that any owner of land could exercise with freedom and impunity. That is to say, any land owner, including the United States, may permit his lands to be pastured or the timber, stone or other substance to be removed therefrom, or may refuse such permission. No element of public use or right is involved. It is clearly a pro-

prietary privilege, and the proprietor may wholly refuse such privilege or impose any such charges therefor as may be reasonable.

A decision holding that the United States may protect its lands from trespassers or from pasturage against its will or from the removal of timber or stone or other substances therefrom, is no more and no less than a decision that the United States may do with its land as any other proprietor might do with his.

However, when we come to the vastly important question of ways, uses and public service which are within and subject to the State's constitutional powers, and which no landed proprietor may close against the developments of the State, we have a question as different as could possibly be conceived and involving under the decided cases of this Court the principle of the equality of right, and opportunity of development of all of the States. In all such cases the decisions of this Court are absolutely uniform and are to the effect that no such right can be denied and that each and every State, whether there are public lands therein or not, is upon an absolute equality with the other States, with reference to the development of the State's resources and the uses of all necessary ways, means and privileges connected therewith.

The *Light* case is not dissimilar from the *Grimaud* case. It involves the proprietary right of the government

to prevent trespassing upon the lands, notwithstanding the lands were unfenced and the State of Colorado was operating under what is generally referred to as the "No Fence" law. The considerations involved are of a strictly private invasion of the proprietary rights of the government in these lands, and in no sense related to their public use, or the development of the State's resources under its authority.

The *Chandler-Dunbar* case, 229 U. S. 53; involved the occupation and use of submerged lands under the navigable waters of the St. Mary's River, and the utilization of the waters of this stream in the development of power.

It is interesting and of controlling importance to note that the situation there involved was directly the reverse of the situation here involved. The position of the Government was predicated upon its governmental right and duty to protect the navigability of the St. Mary's River, and it was correspondingly held that this right was paramount, so that a vested interest could not be acquired in the submerged lands compelling compensation where the same were required for navigation and that the technical title to the submerged lands, where the same were required for navigation, was subject to use by the Government for that purpose without compensation.

Here the condition is absolutely reversed. All of the elements and considerations here involved on behalf of

the United States are proprietary. All of the elements and considerations here involved upon the part of the States, pertain to their equality and sovereignty and governmental rights and duties and to their ability to protect themselves from unequal laws and their citizens in the enjoyment of equal rights to the development of their resources and the continuance of their public services. In the face of such a situation, and in the light of these considerations, undeniably correct, the *Chandler-Dunbar* case is an authority favorable to the appellant in this case. That this situation and distinction was clearly observed by Mr. Justice Lurton, the author of the opinion, is evidenced from the following statements which are quoted from the opinion:

"We may also lay out of consideration the cases cited which deal with the rights of riparian owners upon navigable or non-navigable streams as between each other. Nor need we consider cases cited which deal with the rights of riparian owners under State laws and private or public charters conferring rights."

Some of our adversaries, however, seem strangely unable to distinguish between the United States Government acting in its governmental capacity, under its general constitutional grant of powers, including those governmental powers connected with its duty over interstate commerce and navigable streams, and the United

States acting as the proprietary trustee of the public lands.

The strange hallucination is indulged in that the United States Government, merely because it owns lands within a State, has some kind of governmental control over and duty connected with such State and the franchises, corporate existence, public duties and responsibilities of public service corporations or municipal corporations within such State, merely because they incidentally operate upon the public lands.

The decisions we have cited in the earlier portion of this brief, and including some of the later decisions of this Court, absolutely dissipate and dispel these illusions.

Nevertheless, the delusion seems to continue, and it seems to be assumed that because the United States within certain defined powers and limitations is a government in the fullest sense and dealing with subjects of the greatest magnitude and importance, that it must be so in all instances, and, therefore, where it holds as a trustee lands within a State, that within that State, and especially with respect to industries operating on these lands, it has certain additional, non-constitutional powers, duties and responsibilities of government.

The whole controversy, in all of its more important elements and phases, has originated and has been waged upon the theory that the United States Government is

responsible as a government and possesses powers of government, not only in connection with the public lands themselves, but in connection with easements, ways and uses thereover, and industries operated thereon.

While in truth and in fact, as to all such industries, regardless of the vesting of the rights of way or as to whether they are held in perpetuity or during the period of beneficial use or by mere license, all of the powers of the United States Government under the constitution, wherever at all applicable, operate with the same force and effect upon all persons and all industries, with absolutely unvarying equality, whether they are on or off the public lands, or whether their rights of way have vested or not.

The duties, powers and functions and control of the United States Government as a government over all of the industries of this country relate and operate identically the same. Its powers, duties and governmental authority are no greater and no less, regardless of whether or not the industries are upon the public lands.

Correspondingly, the powers and duties of the State are equal and identical, regardless of whether such industries are upon or connected with the public lands or not. No industry within any State, regardless of whether it was partially or wholly upon the public lands, would be any more or any less under the laws and control and



regulative powers of the State than would be the case if it was entirely off the public lands or partially or wholly thereon.

The whole problem is a misapprehension and a confusion of ideas, and none of the powers of government, either of the nation or of the State, are either limited, extended, varied, changed or affected in any manner by the incidental consideration as to whether or not such industries are upon or connected with the public lands.

REVIEWING THE DECISION IN THE CASE OF THE UNITED STATES V. UTAH POWER & LIGHT CO. RENDERED BY THE UNITED STATES CIRCUIT COURT OF APPEALS, 8TH CIRCUIT, (209 Fed. p. 554).

HEREIN ALSO CONSIDERING THE QUESTION OF THE CLAIMED REPEAL OF THE ACT OF 1866 AND RELATED ACTS BY THE ACT OF MAY 14, 1896 AND THE ACT OF FEBRUARY 15, 1901.

The judgment rendered in this case against the defendant and appellant was entered on the authority of the case above referred to, *United States v. Utah Power & Light Co.*, 209 Fed. 554, decided November 14th, 1913, the District Judge regarding himself bound by that decision.

It appears that the defendant in that case, the Utah Power & Light Co., had been engaged in producing and disposing of electric power to the public generally since December, 1900, its works consisting of a reservoir, a

flume or conduit conveying the flow of water from the reservoir to the power works, also pressure pipes and power house station, all equipped with the necessary machinery and apparatus and transmission lines. The reservoir, flume and conduit were situate partially upon and within the lands of the United States. The defendant claimed to have acquired its rights under the customs, laws and decisions of the Court of the State of Utah, and that they were recognized and confirmed by Section 2339 of the Revised Statutes. The Government claimed that such rights of way for power purposes could not be acquired under the act (Sec. 2339) of the Revised Statutes, because such companies and such purposes were not contemplated by Congress at the time of the enactment of these laws and were not, therefore, within the intention and meaning of those acts. Upon this point the decision of the Circuit Court of Appeals was against the Government. The Government further claimed that Congress has since made specific and comprehensive provision defining the procedure by which and the extent to which the use of the public lands may be granted and acquired for the purposes stated, and

“that this legislation withdraws such uses from the terms of Section 2339 of the Revised Statutes, if they were ever included therein,”

(see p. 555), the legislation referred to being that of May 14, 1896, which is set out in the opinion. This latter contention is fully stated in the opinion, and the opinion sustains the position of the government thereon. It was also contended that since that time and since the adoption of the act of 1896 and of the rules and regulations thereunder as against the United States, no rights could be acquired in the public lands for purposes of generating, manufacturing or distributing electric power, except in conformity with that act.

The opinion of the lower court had been to the effect that the defendants' rights were vested under the act of 1866, and dismissed the bill. The Circuit Court of Appeals reversed this judgment on the grounds last stated. After stating the contentions of the defendant on, the opinion of the Circuit Court of Appeals stated:

"The proposition that absolute and perpetual rights in the public lands may be acquired for private gain by mere appropriation, without purchase or compensation, and in the exercise of a State sovereignty which transcends the constitutional power of the Congress, is a somewhat startling one, and must be considered first."

With all due respect we submit that the quoted paragraph contains strangely erroneous assumptions. It is not to be questioned, and is not questioned, in the opinion (except for the supposed effect of the act of 1896), that

under the act of 1866 absolute and perpetual rights for the purpose of the beneficial use of water could have been and were over a long period of years acquired in the public lands, and if it is desired to put it that way, in the exercise of a State sovereignty. We are, therefore, unable to see that anything very startling is involved in the consideration, even if we assume that what is referred to is the contention that such rights were inherent in the States.

In reaching its decision in this case, the Circuit Court of Appeals does not appear in any manner to have considered the act of March 3rd, 1877, referred to as the "Desert Land Act." It would certainly seem that if the provisions of this act had been considered in connection with the act of 1866, it could hardly have been held that not only had the act of 1866 been amended or substituted for by the act of 1896, but that also the sweeping and wholesome provisions of the act of 1877 had been equally curtailed and their effect limited, and practically taken away, by the act of 1896, adopted apparently, with reference to rights, not in conflict with but entirely consistent with the acts of 1866 and 1877. We have heretofore commented on the act of 1877, and in that connection have cited the case of *Hough v. Porter*, 51 Ore. 318; 98 Pac. 1083, and the case of *Bouquillas, etc., Co. v. Curtis*, 213 U. S. 339. We think a consideration of the act of 1877

will illustrate how far the decision of the Circuit Court of Appeals misinterpreted and misconstrued the acts of Congress.

Quite a number of cases are cited in the opinion, but a consideration of the same will show that they are cases relating to the proprietary right and disposition of the public lands, and few if any of them have any relation to the question of ways and easements for roads, canals and other easements and uses essential to the development of the State's resources. For instance, the case of *Kansas v. Colorado*, supra, is one of the cases cited, and in that case it is very clearly pointed out that while the United States Government has the complete rights of a private proprietor, it has not in the public lands separate and sovereign right, distinct from that of any other proprietor, which would enable it to close the ways and avenues of the State so that no public uses could be enjoyed over the public lands or the State developed in any way.

The case of *Jourdan v. Barrett* is quoted from 4 How. 184, 169. The questions there involved pertained solely to the proprietary rights of the litigants, and being a very ancient case, of course there was no relation to any of the present laws of Congress, nor were any of the questions that are here involved and which are of great importance, involved in that case. The questions involved related principally to title and proprietary interest, and

as to the supremacy of the laws of Congress thereon, there is of course no doubt whatever.

The case of *Wilcox v. Jackson*, 13 Pet. 498, was an action in ejectment by one claimed proprietor against another, and the question was as to whom the title had passed. It was, of course, properly held that whoever had deraigned title pursuant to the laws of Congress had the better right.

The following quotation is made from *Camfield v. United States*, 167 U. S. 518:

"While the lands in question are all within the State of Colorado, the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to pre-emption or homestead settlement; but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market."

Certainly there is nothing in the paragraph quoted from the *Camfield* case, relied upon by the Circuit Court of Appeals, which in any way militates against any contention we have made in this case, but, on the contrary, it supports our contention that the United States is

a trustee proprietor of the public lands and may protect them from private trespass.

The Court then takes up the "Enabling Act" or the act for the admission of Utah; but the provisions of this act are quite similar to those of many if not most of the other States, and so far as they relate to the proprietary interests of the Government of the United States therein, they are simply confirmatory of the constitution. And if these provisions are asserted as having the effect to give the State of Utah any less right or authority as to the development of its resources or the necessary public uses over the public lands within that State than exists in other States, we dispose of that matter by pointing to the decisions of this Court already cited, that Congress would have no power or authority to insert in the act of admission of any State any provision that would place the State when admitted upon an inequality of right with each and all of the other States of the Union.

Certainly a State that could not equally develop its resources or that could not equally assert its right to the ways and uses over the public lands, or that could not protect an industry or public service within its jurisdiction, as any other State might do upon any other lands, would be wholly unequal with the other States of the Union; and such a situation is constitutionally impossible.



The Circuit Court of Appeals then takes up and considers the act of 1866 and related acts and cites authorities that statutes granting privileges or relinquishing rights to the public are to be construed against the grantee.

In view of the diametrically opposite situation, however, that the rights over the public lands are not against the public interest and apply only to the proprietary interest of the Federal Government, and that developments of this character are of a public nature, with the conditions reversed, the reasons are reversed. This Court has held that the rights referred to in the act of 1866 were simply a recognition of constitutional rights, and in the public interest, and for the development of the natural resources of the State, and open to all, and by no possibility can such rights be properly catalogued as relinquishing rights of the public. That act was really in recognition of the public right for public uses over the lands of the United States, held by it as a trustee proprietor, and not otherwise.

We think also the Court in passing upon the language of Mr. Justice Field in *Jennison v. Kirk*, supra, wholly misconstrued the principles and intention of the language used, and this view is verified by other opinions of Justice Field, on the same subject, he being one of the clearest advocates of the constitutional rights of the States to develop their resources, and that the public lands should

be held in subserviency to their rights of development and necessary public use.

The Circuit Court then says:

"It remains then to consider whether Congress, prior to any possession acquired by appellee, had withdrawn or limited the recognition accorded by the act of July 26, 1866, to such extent that appellee may not rely upon that act in defense of this action."

After considering this question the Court reached the conclusion that rights involving the generation, manufacturing and distribution of electric power had been withdrawn and modified and restricted by the subsequent act of May 14, 1896.

We shall now proceed by the very rules and tests laid down in the opinion to demonstrate that this assumption of repeal or withdrawal of the provisions of the act of 1866 from the uses involving the generation of electric power is altogether erroneous.

It will first be observed that the act of 1896 is to authorize the Secretary to permit the use of certain defined rights of way together with the necessary ground, not exceeding forty acres, upon the public lands and forest reserves, for the purpose of generating, manufacturing or distributing electric power, a thing which he had held that he was not authorized to do under prior acts. It will also be observed that these developments are in their

nature permanent and expensive, and will naturally involve large expenditures of money to establish a public service thereunder and in connection therewith, so that upon the authorities already cited it is clear that the uses contemplated are to be permanent and the rights thus acquired are not terminable. The assumption, therefore, must be that, merely because the permission has not been obtained under the rules, although the lands have been occupied, the water right vested and the public service developed, the water rights are subject to forfeiture and the connected properties to destruction, and that the public service may no longer be continued because the permit has not been obtained under the former regulations of the Secretary of the Interior adopted under the act referred to.

Addressing ourselves, however, to the precise subject involved in the opinion, namely, as to the repeal or substitution by implication of the act of 1866 by the act of 1896, the rule is stated in the opinion quoting from a decision, in the following language:

"If the two are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and anywhere two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that

act." *United States v. Tynen*, 11 Wall. 88-92 (20 L. Ed. 153); *Daviess v. Fairbairn*, 3 How. 636, 11 L. Ed. 760; *Tracy v. Tuffly*, 134 U. S. 206-223, 10 Sup. Ct. 527, 33 L. Ed. 879."

Before citing the authorities, we wish to call attention to the fact that instead of there existing a substitution or repugnancy between the two acts, they are entirely consistent one with the other, and might have been enacted at the same time, and all of the provisions might have become the co-operative part of one law without the slightest difficulty.

The act of 1866 relates to the confirmation of rights of way for the use of water for all beneficial purposes, and recognizes that whenever under the State laws or customs the right to the appropriation of the water has vested, the right of way is correspondingly vested.

For illustration, if the two enactments had been adopted together, assuming that the act of 1866 would have been carried into the law first (omitting the portion referring to the liability for damages as immaterial here) the enactment would read in this way:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right

of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

And provided also:

"Sec. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States by any citizens or association of citizens of the United States, for the purposes of generating, manufacturing or distributing electric power."

It will be observed that appending the provisions of the act of 1896 to the act of 1866, it would have related to certain uses not specifically provided for in the act of 1866, namely, a right of way obviously falling under the head of "manufacturing or distributing electric power."

Obviously the right of way to the extent of twenty-five feet cannot refer to canals because in the very nature of such canals or aqueducts in many instances they would greatly exceed the width called for, and therefore, since they are already provided for, the provision is intended to relate only to transmission lines. And in providing for the forty acres or less, for generating stations, something is provided entirely consistent with, but not specifically covered by the act of 1866.

Now, if we should reverse the order and place the act of 1896 first, and the act of 1866 following the same, we would have a perfectly rational and intelligent enactment, as follows:

"Sec. 1. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purpose of generating, manufacturing or distributing electric power."

"Sec. 2. Whenever, by priority of possession, rights to the use of water for mining, agricultural or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

The first enactment would provide for permission under the regulation of the Secretary of the Interior for certain novel and exceptional uses in connection with the beneficial use of water devoted to the generation of electric power, and the latter portions of the act would provide for the vesting of these and all other necessary rights of way, whenever the right to the appropriation and use

of the water had accrued and vested.

The contention that Congress intended to do anything more than merely make clear provision for the peculiar necessities of the hydro-electric development of the public lands, or that it in any manner intended to repeal or substitute anything for the act of 1866, is wholly contrary to the history of the country, the records of Congress, and the public understanding.

The records of the departments, the records of Congress, and the records of this Court, including the record of the proceedings in the case of *Kansas v. Colorado*, supra, occurring in 1906, shows that it was universally understood that the act of 1866 was in full force and effect, and that whenever the right to the use of water for any beneficial purpose had vested and accrued, the rights of way therefor were recognized and acknowledged and confirmed under the act of 1866, and connected and consistent legislation, including Section 2340 of the Revised Statutes.

In the opinion great importance is attached to the act of 1896 in the following language:

"Evidently that body perceived that the time had come when changed conditions and complex interests and relations of our national life demanded that with respect to this particular form of industry the application of the former act as worded and construed should be modified and restricted; therefore, it enacted the subsequent legislation."



Obviously, the Court in this connection was assuming that by the act of 1896 the United States Government was intending to take over governmental authority distinct from that exercised by or under the constitution with respect to hydro-electric developments on the public lands. Otherwise there could have been no relation to the

“complex interests and relations of our national life,”

If this is the view of the Circuit Court of Appeals then we may confidently assert that the whole theory is wrong and fundamentally incorrect. The United States Government takes care of the

“complex interests and relations of our national life,” wholly under the constitution of the United States, and its ownership of the public lands is purely incidental and gives it no governmental power whatever, nor is any such power needed. And we may submit that it is not strange, if the Court in passing on the case held such views of the purposes of Congress and of the functions and duties of the United States concerning the public lands, that it reached the incorrect conclusion that the act of 1896 was intended, not as a recognition of the necessary uses for transmission lines and power houses, but that the government of the United States was really intending to enter into the situation as a government and assume exceptional governmental control over these industries.

Obviously the opinion is predicated upon this theory, and we may submit that the theory, under the decisions of this Court, is wholly erroneous.

We will conclude a discussion of this subject by referring to and distinguishing the authorities cited by the Court in this case, and by the citation of other authorities which, we think, fully sustain our contention that the act of 1896 in no manner repealed or affected or modified the act of 1866.

The following cases are relied upon by the Circuit Court of Appeals in its opinion, as sustaining the presumption of repeal. The first is the case of *Jackson v. Chicago*, 178 Fed. 432. This decision was with reference to the construction of the statute relative to removals of causes and motions to remand, and it was held that a certain specific and comprehensive statute had superseded another. How far removed that case is from the case here can only be realized by reading the opinion.

The case of *Kepner v. United States*, 195 U. S. 100, is a very interesting one with relation to the Government of the Philippine Islands, and the decision was to the effect that the act of the Philippine commission was repealed by the subsequent act of Congress. There could be no clearer example of repeal by implication or one farther removed by analogy from the Utah case.

*Tracy v. Tuffly*, 134 U. S. 206.

We quote from that case the following illuminating sentence:

*"A previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both and to prescribe the only rules in respect to that subject that are to govern."*

We invite the Court's consideration of the two statutes under review in that opinion.

*United States v. Tynen*, 78 U. S. 88.

In the opinion in this case by Justice Field, it was held there was a clear repugnancy between the provisions of the two acts, and the following language was used:

*"When there are two acts on the same subject, [the two acts here under consideration are in a large part not even on the same subject] the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even when the two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."*

We might submit the whole question upon this luminous statement of the rule, for in fact, the act of 1866 is in all respects consistent with the act of 1896; and if the

provisions of the act of 1866 simply followed and were repeated in the act of 1896, there would not be the slightest possible repugnancy, and in fact it is entirely consistent with the later act.

*Daviess v. Fairbairn*, 3 How. 636.

We quote from this opinion :

"In this respect it is clear there is no repugnancy between the two acts. The two provisions may well stand together; the latter is cumulative to the former."

No plainer description of the present acts could be stated if the words were changed to read:

"The two provisions may well stand together. The latter is in aid of the vesting of the rights provided for in the former."

We state the following matters as practically undisputed rules in connection with the question of the repeal of a statute:

*Repeals by implication are not favored.* They will not be indulged in unless it clearly appears that the legislature so intended. The later act must be either repugnant to the earlier one, or fully embrace the subject matter thereof, or the reason for an earlier act must have been beyond peradventure removed.

In order that an implied repeal may result from repugnancy, the *repugnancy* appearing in the two statutes

*must be wholly irreconcilable*, and it must also be clear and convincing and follow necessarily from the language used. Every effort must be used to make all acts consistent, and the later act will not operate as a repeal of the earlier one if by any reasonable construction they can be reconciled.

When the later of two acts covers the whole subject matter of the earlier one not purporting to amend it, and *plainly shows* that it was *intended* to be a *substitute* for the earlier act, such later act will operate as a repeal of the former one, though the two are not repugnant. But there must be an *unmistakable intent* manifested on the part of the legislature to make the new act a substitute for the old, and to make it *contain all the law* upon the subject; for mere similarity in the provisions of the two statutes is not enough to effect a repeal, even though the similarity may be such as to cause confusion or inconvenience.

26 *Am. & Eng. Encyc. of Law*, 2 Ed. 731, et seq.

When some office or function can by fair construction be assigned to both acts and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject. The earlier statute continues in force, unless the two are clearly inconsistent with and repugnant to each other, or unless in the later statute

some express notice is taken of the former, plainly indicating an intention to repeal it; and when two acts are seemingly repugnant, they should, if possible, be so construed that the later may not operate as a repeal of the former by implication.

*Lewis' Sutherland Statutory Construction*, Second Ed. Sec. 247.

If two statutes *can* be read together without contradiction, or repugnancy, or absurdity, or unreasonableness, they *should* be read together, and both will have effect. It is not enough to justify the inference of repeal though the later law is *different*; it must be *contrary* to the prior law. It is not sufficient that the subsequent statute covers some, or even all the cases provided for by the former, for it may be merely affirmative, or cumulative, or auxiliary; there must be positive repugnancy; and even then the old law is repealed by implication only to the extent of the repugnancy. For, if by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in harmony, and without absurdity, both will be upheld and the later one will not be regarded as repealing the other by construction or intendment. As laws are presumed to be passed with deliberation, and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute,

did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable.

*Lewis' Sutherland Statutory Construction*, Second Ed. Sec. 267.

The rules of construction above referred to have been approved and applied in the following cases:

*Ex Parte Crow Dog*, 109 U. S. 556, 570.

"Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new law and those of the old."

*State v. Stoll*, 17 Wall. 425, 431; holding provision in act incorporating bank not repealed by general law as to receivability of bank notes for taxes.

The Court said:

"To justify this Court in holding that the act passed in that year (1843) repealed or modified the sixteenth section of the charter of the bank in question, it must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be."

In *Arthur v. Homer*, 96 U. S. 137, 140, holding duty on embroidered goods not repealed by general provision of subsequent act, the Court said:



"To induce a repeal of a statute by the implication of inconsistency with a later statute, there must be such a positive repugnancy between the two statutes that they cannot stand together."

*Red Rock v. Henry*, 106 U. S. 596, holding no repeal was intended of act authorizing issue of bonds by county.

The Supreme Court said, after citing and quoting from a number of cases decided by that Court:

"The result of the authorities cited is, that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable *conflict*, or unless the later statute covers the whole ground occupied by the earlier, and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest."

*Fussell v. Gregg*, 113 U. S. 550, holding act of 1804, respecting military district, not repealed by implication by any subsequent act.

*Frost v. Wenie*, 157 U. S. 46, 58, giving effect to two acts relating to pre-emption of Indian lands. This is a very important decision, and is often cited as authority by the courts. The whole decision seems to be applicable to the question under consideration. This court held the two acts there in question not conflicting, because there was an interpretation of the later act that would give effect to its provisions, and at the same time leave untouched the prior act as expressing the will of Congress

in respect to the Osage trust and diminished reserved lands; and that there was no difficulty in giving effect to the provisions of both acts without infringing any established principle for the interpretation of statutes. Referring to the rule of construction applicable, the Court, through Mr. Justice Harlan, said:

"It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the Court—no purpose to repeal being clearly expressed or indicated—is, if possible to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore, to displace the prior statute."

*United States v. Healey*, 160 U. S. 136.

Here the Supreme Court had under consideration two acts of Congress, one of 1877 fixing the price of "Desert Lands" at \$1.25 per acre, which was the later statute, and the other and former statute, the proviso of U. S. Rev. Stat. Sec. 2357, fixing the price of lands in the alternate sections reserved by Congress in a railroad land grant at \$2.50 per acre. The Court said:

"Did the act of 1877 supersede or modify the proviso of U. S. Rev. Stat. Sec. 2357, which expressly declared that the price to be paid for alternate reserved lands along the line of railroads, within the

limits defined by any act of Congress, should be \$2.50 per acre?

"The principal, if not the only, object of the requirement that the alternate reserved sections along the lines of the land-grant railroads should not be sold for less than double the minimum price fixed for other public lands was to compensate the United States for the loss of the sections given away by the government.

"The act of 1877 and the proviso of U. S. Rev. Stat. Sec. 2357, both relate to public lands; the former to desert lands, that is, such lands—not timber and mineral lands—as require irrigation in order to produce agricultural crops, and the price for which was \$1.25 per acre; the latter, to such lands, along the line of railroads, as were reserved to the United States in any grant made by Congress, and the price for which was \$2.50 per acre. As the statute last enacted contains no words of repeal, and as repeals of statutes by implication merely are never favored, our duty is to give effect to both the old and the new statute, if that can be done consistently with the words employed by Congress in each. We perceive no difficulty in holding that the desert lands referred to in the act of 1877 are those in the States and Territories specified, which required irrigation before they could be used for agricultural purposes, but which were not alternate sections reserved by Congress in a railroad land grant. It is as if the act of 1877, in terms, excepted from its operation such lands as are described in the proviso of U. S. Rev. Stat. Sec. 2357. Thus construed, both statutes can be given the fullest effect which the words of each necessarily require. In the absence of some declaration that Congress intended to modify the long established policy indicated by the proviso of U. S. Rev. Stat. 2357, we ought not to suppose that there was any purpose to except from that

proviso any public lands of the kind therein described, even if, without irrigation, they were unprofitable for agricultural purposes. To hold that alternate sections along the lines of a railroad aided by a grant of public lands, being also desert lands, could be obtained, under the act of 1877, at \$1.25 an acre, would be to modify the previous law by implication merely."

In *Wilmot v. Mudge*, 103 U. S. 217, it was said:

"The rules construing statutes in like cases with the present are so well understood as to need no citation of authorities. They are: First, that effect shall be given to all the words of a statute where this is possible without a conflict; and Second, that as regards statutes in *pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted."

*United States v. Hampton* (C. C. A. 4th Circuit), 101 Fed. 714, in which the Court held that Rev. Stat. Sec. 4716, providing that no money on account of pensions should be paid to any persons \* \* \* who in any manner voluntarily engaged in or aid the late rebellion, was not repealed by implication by act of June 27, 1890 (26 Stat. Sec. 6634), known as the "Dependent Pension Act," but applies to pensions granted or applied for under said act. The Court said:

"This act of June 27, 1890, was a short act, of four sections, the purpose of which was to enlarge the existing acts so as to give a pension to United States soldiers and sailors of the war of the Rebellion who were incapacitated to such a degree as to be unable to earn a support, and also to provide pensions for their widows, children, and dependent parents. It does not in express term repeal any existing acts—not even those inconsistent with it. It simply enlarges the class of persons who may obtain pensions, and guardedly refrains from affecting any existing laws with regard to pensions. It is not possible to argue that it covers the whole subject of the prior existing laws, and was intended as a substitute for them. To contend that the pensions under this act of 1890 were unaffected by the general provisions of the Revised Statutes, providing that pensions could not be attached or assigned or pledged, or that persons presenting false affidavits concerning claims for pensions under that act could not be punished under the sections of the general act, would be a proposition that could not be maintained. It is a familiar law that repeals by implication are not favored (*McCool v. Smith*, 1 Black 459-470, 17 L. Ed. 218), and that such an implication arises only where there is positive repugnance between the new law and the old, and then only to the extent of the repugnancy."

In nearly all of the above cases we find a reference to *Wood v. United States*, 16 Pet. 342, 362, where Mr. Justice Story, speaking for the Court upon a question of the repeal of a statute by implication, said:

"That it has not been expressly or by direct terms repealed, is admitted; and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say by necessary

implication, for it is not sufficient to establish that subsequent laws cover some, or even all of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of repugnancy."

In *Curry v. Lehman*, 55 Fla. 847; 47 So. 18, the rule is well expressed thus:

"The rule of construction in such cases is that if courts can by any fair construction or liberal construction find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject, it is their duty to do so."

In *State v. Omaha E. Co.*, 75 Neb. 637—106 N. W. 979, the Court said:

"Statutes in *pari materia* are to be construed together, and repeals by implication are not favored. The Courts will regard all statutes upon the same general subject matter as part of one system, and later statutes should be construed as supplementary or complementary to those preceding them. \* \* \* It has been said 'In the the course of the entire legislative dealing with the subject, we are to discover the progressive development of a uniform and consistent design, or else a continued modification and adaptation of the original design, to apply it to changing conditions and circumstances. In the passage of each

act, the legislative body must be supposed to have had in mind, and in contemplation, the existing legislation on the same subject, and to have shaped its new enactment with reference thereto.' (*Black on Interpretation of Laws*, page 204.) The rule is that all statutes in *pari materia* must be taken together and construed as if they are one enactment. Statutes should be so construed, if possible, as to give effect to every provision, and an act should not be placed in antagonism with another act, unless such was the manifest purpose and object of the legislature."

In the light of what has already been said and of these authorities, it will be unnecessary for us to discuss the relations which the act of 1901 bears to the act of 1866. It is as clear, we think, as anything can be, that no other force or effect can be given to the act of 1901 than that it was intended to place in the Secretary a reasonable supervisory power to protect the proprietary interest in the location of ways and uses over the public lands consistent with the existing acts of Congress.

In this connection it is of controlling importance to consider that the construction given to the act of 1896, holding that it repealed or must be held as substituted for the act of 1866 with relation to the use of easements for electric power would render the act of 1896 subject to the constitutional objections heretofore fully argued as to the act of 1901.

In fact, the act of 1896 contains no elements or provisions that could be tortured into any intention to convey



governmental authority. Neither does the act pretend or purport to grant or convey any right to any State or to any corporation or to any person. Unless it is to be construed as we contend, as merely designed to define and make clear certain uses connected with and essential to the rights granted under the act of 1866, it is subject to all of the fundamental and constitutional objections set forth with relations to the act of 1901.

The act of 1896 never was construed in the department as amendatory of or as substituted for the act of 1866, and if it had been so construed it would not have been a law or regulation of Congress at all, but a mere delegation of legislative power to an executive department, not for the enforcement of a right or a regulation under a law, but a delegation of arbitrary power connected with no law and restrained by no law. If in aid of the act of 1866, the act of 1896 is rational and constitutional supplementary legislation; but if it was intended to repeal the same it substituted no law therefor, conferred only an arbitrary power on the secretary, and we have already argued at length and cited authorities that such an enactment standing alone is no law at all, but is unconstitutional and void. The only way either the act of 1896 or the act of 1901 can be given any constitutional force or effect is by construing them in aid of and consistent with existing laws of Congress. Otherwise, each would equally

represent a void attempt to delegate power arbitrarily to recognize a right or to refuse to recognize such right. Such arbitrary power, being invested in an executive officer with no accompanying rights or privileges in any State or in any person; and this Court has said that no such arbitrary power has any place in our constitutional scheme of a government of law.

### CONCLUSION.

In concluding this brief, already far too extended, it is not our purpose to review any of the questions in detail involved in the case.

We might rest the case, we think with absolute assurance, upon a construction of the acts of Congress that the title and right of the appellant is clearly vested thereunder.

Also, upon the clearly established situation that the rules and regulations of the departments are not only without authority in, but are contrary to the acts of Congress and are null and void.

Also, upon the proposition that not only is the water right owned by the appellant vested under the laws of the State of Utah, but the appellant is engaged in an essential public service which the State has a right and duty to compel and require to be continued, and which public service no owner of property within the

State, including the United States, as such owner, has any right to prevent or interfere with.

The real, fundamental question, however, and the one that must be decided, and which, when decided, forecloses discussion of any other question, is that of the equal right of the public land States, in common with all of the other States in the Union, to develop their resources, develop and enjoy their water rights and water privileges, develop and establish all needful ways of commerce, travel and communication, and to require and have continued all established and necessary public services to its people and to protect the people of such States from all excessive, unreasonable or unequal taxation or charges.

The United States was granted in the Constitution control over and the power of regulating commerce between the States. Incidental and necessary to the full carrying out of this grant, was the development and improvement of the navigable streams, including the improvement in their beds and banks and the use or removal of the submerged lands which, except for this right and duty on the part of the Federal Government, belong to the several States.

This grant, right and duty of development of navigation, has been held to include the right and duty, without compensation, to the States or others claiming the submerged lands, to dredge or otherwise remove or alter such submerged lands.

Correspondingly, the public lands are held by the Government of the United States subject to the reserved right, power and duty of the State equally with the States within which there are no public lands, to develop their resources and construct all necessary roads, railroads, lines of communication, canals and the other ways and uses essential to the development of the State and its resources, and for the use and benefit of its people.

This reserved right and power of development and enjoyment of resources is as much a sovereign right and is as essential to the power, equality and dignity of the State as is the control of the Federal Government over navigable waters in aid of commerce between the States.

There appears to be no sound reason why these public rights and duties of the nation and of the State should not be treated as upon a parity and exercised upon an equality. Moreover, the unavoidable situation remains that it cannot constitutionally be correct to assume that the United States Government holds the public lands in a governmental and sovereign sense, and in that capacity is in position to permit or refuse to the public lands States the enjoyment of the equal right and privileges of the character outlined equally with all of the other States in which there are no such publicly owned lands.

The contemplation of such a situation is incompatible and impossible in view of the constitutional equality and

dignity of the States and the definitely decided doctrine that the title and ownership of the public lands, notwithstanding its right to protect its proprietary interest therein, cannot be so held or enjoyed as to interfere with, disturb, or prevent the absolute equality of the States of the Union.

An analysis of the position of the Government will demonstrate that what is here sought is the exercise of powers of government, including the collection of revenues and the exercise of direct government control over industry in connection with the public lands, and with respect to the citizens of and industries wholly within the State, over which it cannot be even pretended the United States has or holds any constitutional jurisdiction.

There cannot possibly be any real necessity for the assertion or exercise of any such additional or exceptional authority.

If the power and authority of the United States is exercised and operates equally in each and every State of the Union, and equally with respect to all of the citizens and industries within the United States, there can be no failure of the exercise of proper and adequate jurisdiction of the United States upon or in connection with the industries situated upon the public lands.

It is also undenied that the powers of each and every one of the States are equal over all lands within the

State, whether publicly owned or not, and as to all industries operated thereon or in connection therewith.

It is, therefore, obvious, that the attempt upon the part of the United States to assert separate and distinct powers of government in conjunction with the public lands is wholly unnecessary and would not be beneficial but hurtful and wholly apart from and in defiance of the fundamental principles of our institutions, namely, a union of States equal in power, dignity and authority and opportunity, each with the other.

It also follows, if these considerations are correct, that the laws, rules and regulations of the United States concerning the public lands should be wholly with reference to the protection and disposition of its proprietary interest in such lands, and no such legislation in any proper sense can deal with any general questions of government whatsoever.

The true test of the constitutionality of a law passed with relation to the public lands, would appear to be whether it has a similar effect in all the States of the Union and would be enforceable if it had no relation to the public lands. If such act, separately passed, would not be constitutional and enforceable, it would appear to be unavoidably true that the mere inclusion of the same in an act concerning the public lands could not render it constitutional or valid. There is not involved in this

controversy in the slightest degree any question of the exemption of any State, or of the citizens of any State, or of the industries within any State, from the complete and full operation of the laws of the United States. The complete and full operation of all of the laws of the United States over all the industries situated upon the public lands is undenied and undeniable.

The whole argument is against the assertion of unequal powers of government, of unequal restraints, of unequal privileges, and the right to impose unequal charges and the forfeiture of water rights already vested, and the forfeiture and destruction of connected property, and the destruction of a public service within a State.

We are contending for the absolute equality of all of the States, and of all of the citizens of the United States, and of all of the industries operating in the United States, and correspondingly and necessarily for the full, absolute and equal operation of the laws of the United States in every State in the Union.

This being the situation, what rational argument of constitutional law, what reason of justice or public policy can there be in the attempted assertion by the United States in the State of Utah of unequal powers of government, of unequal control over industries, of the right to deny to the State the right to develop its resources or to impose exceptional charges, burdens or restrictions there-



on? What necessity is there for any such assertion? What benefits can grow out of the same or accrue to anybody in connection therewith?

Infinite evils can follow the unequal operation of the laws of the United States, but no evils can ever follow or flow from the equality of the States or the equal operation of the laws of the United States in every State, and with respect to every citizen of United States.

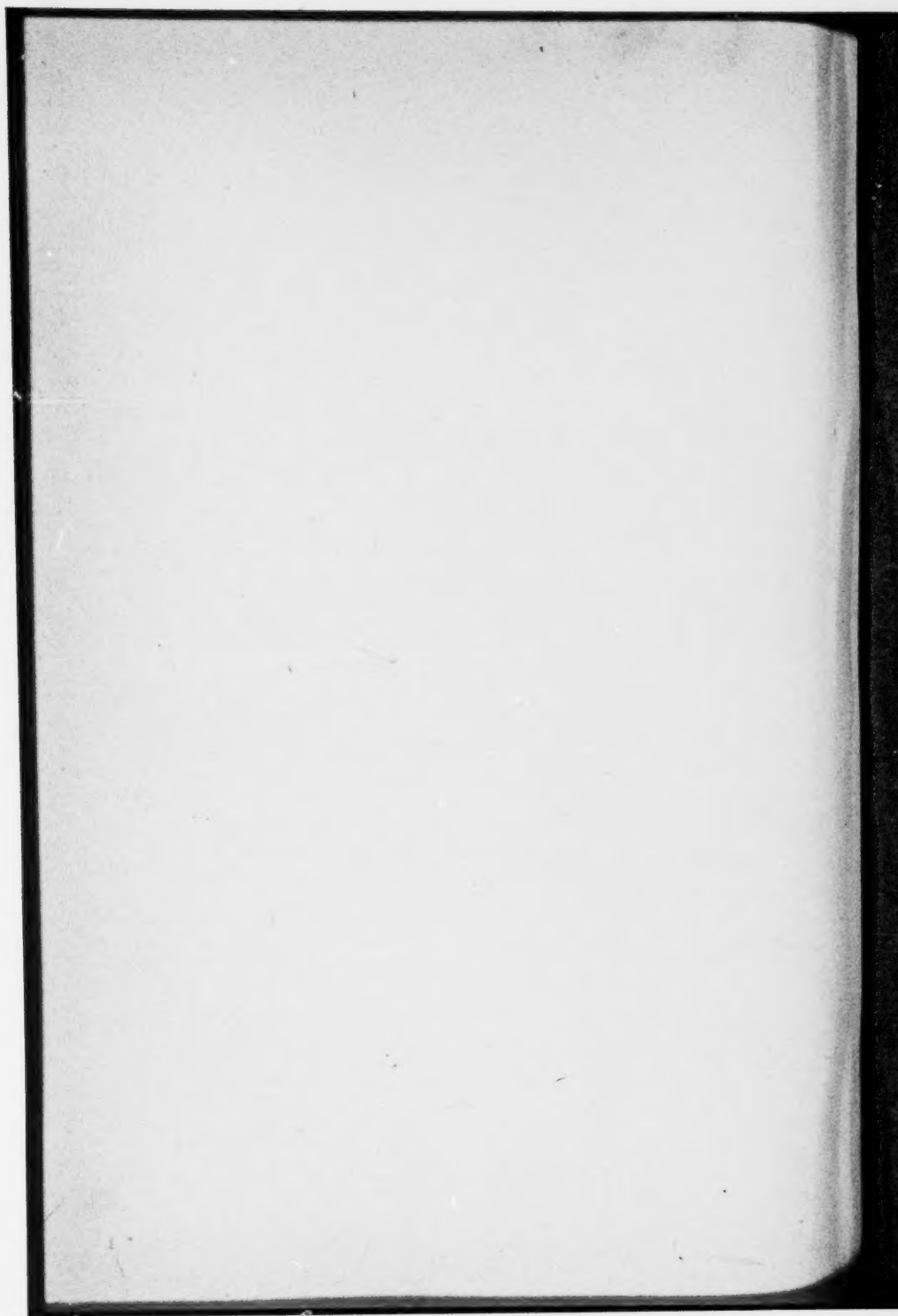
Respectfully submitted,

FRANK J. GUSTIN,  
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FRANK H. SHORT,  
CLYDE C. DAWSON,  
H. R. WALDO,

*Of Counsel.*



IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1915

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**No. 574**

THE BEAVER RIVER POWER COMPANY, *Appellant*,  
*v8.*  
THE UNITED STATES.

**No. 575**

THE UNITED STATES, *Appellant*,  
*v8.*  
THE BEAVER RIVER POWER COMPANY.

---

*Appeal From the District Court of the United States for  
the District of Utah.*

---

MOTION OF THE STATE OF IDAHO, BY ITS ATTOR-  
NEY GENERAL, TO FILE BRIEF AND PRESENT  
ORAL ARGUMENT, AS AMICUS CURIAE.

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Comes now the State of Idaho, by its Attorney General, and moves that it be allowed and permitted by this Honorable Court to appear as amicus curiae in the above entitled appeals, that it be allowed and permitted to file brief therein, and that it further be allowed and permitted to present oral argument by its Attorney General at the hearing of said appeals by this Honorable Court. And in support of this motion,

*Your Petitioner Represents:*

First: That the Attorney General of the said State of Idaho is duly authorized by the statutes and laws of said State to appear for and represent it in all suits, actions or proceedings wherein its interests are involved.

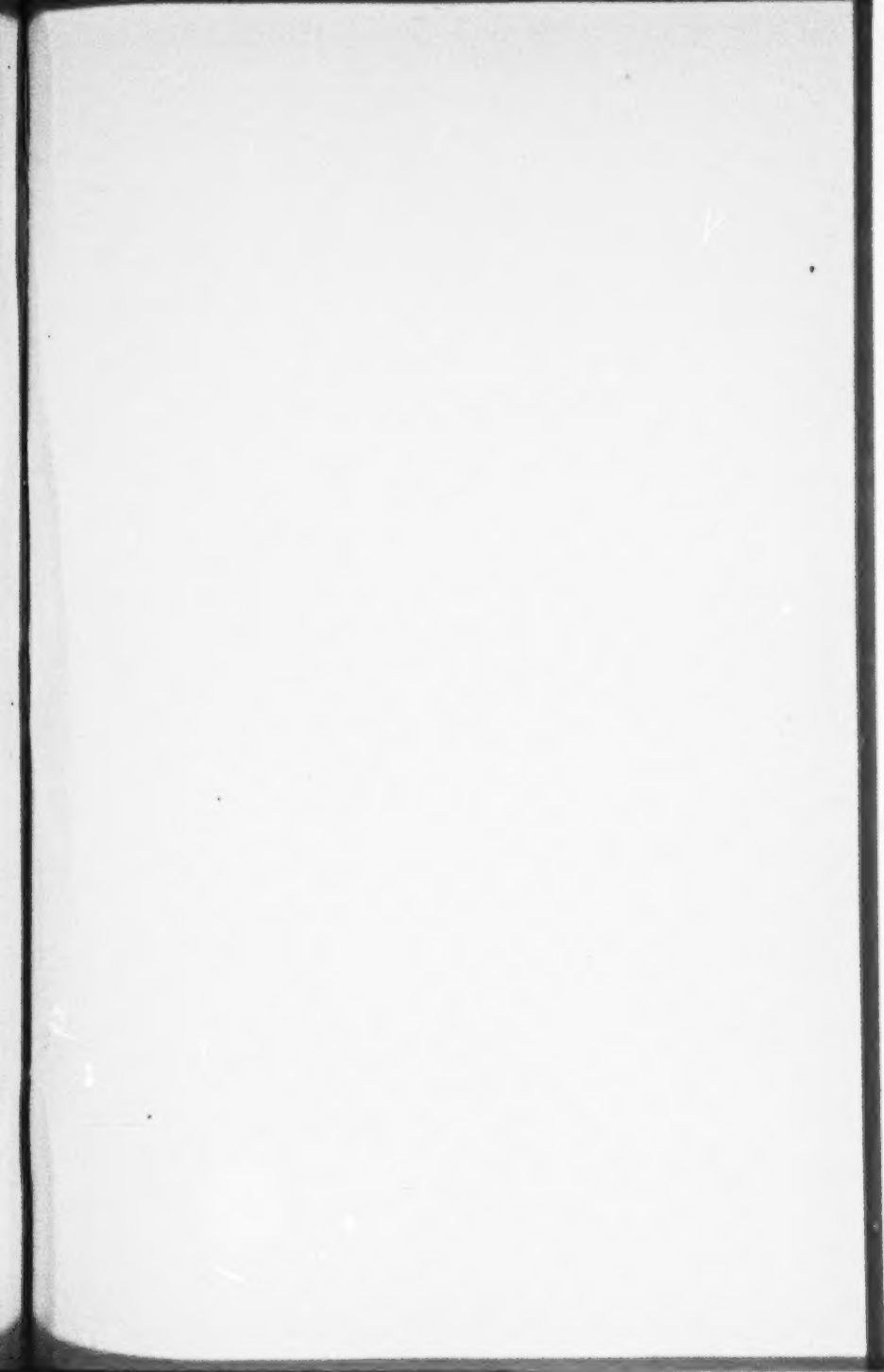
Second: That in said action, and the decree therein, now before this Honorable Court on appeal, there are matters of vital importance to the State of Idaho touching questions of State sovereignty, and the rights of the state to control and administer natural resources within the State, particularly with reference to water powers and public uses growing therefrom. That as a matter of right, before a final determination of the appeals herein the State of Idaho ought to be heard by this Honorable Court upon all such matters, wherein said State has an interest in the determination of its rights as a sovereign State to control and administer all natural resources within its boundaries and possessed by it, and to control and administer all public uses growing from, and incidental to, the proper development and public use of such resources.

*WHEREFORE*, Your petitioner respectfully prays to be allowed and permitted to appear before this Honorable Court as *amicus curiae* in this action, in the manner and for the purposes above set forth.

THE STATE OF IDAHO.

By J. H. PETERSON,

*Its Attorney General.*

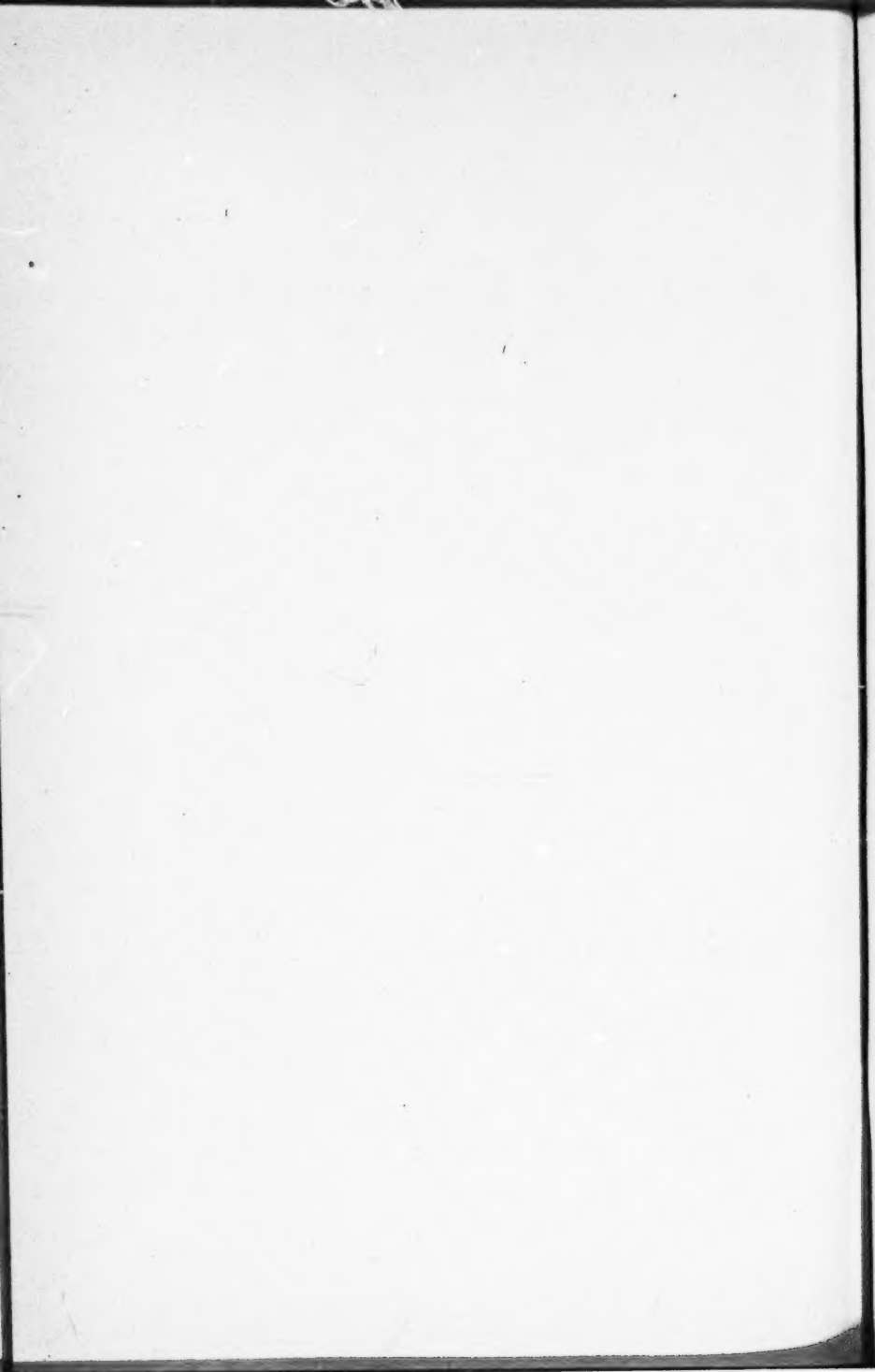


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IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1916.

---

**No. 204.**

THE BEAVER RIVER POWER COMPANY,  
APPELLANT,

*vs.*

THE UNITED STATES, APPELLEE.

---

**No. 205.**

THE UNITED STATES, APPELLANT,

*vs.*

THE BEAVER RIVER POWER COMPANY,  
APPELLEE.

---

**REPLY BRIEF FOR APPELLANT, THE BEAVER RIVER  
POWER COMPANY.**

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The questions pending for decision in these cases have been by appellants so fully and exhaustively discussed in their opening briefs that our reply brief can be confined to

the necessary but limited scope of a reply to the arguments and authorities presented in the brief for the United States.

Not only is the discussion of these questions very full and complete in appellant's opening brief, but an elaborate brief has been filed on behalf of the intervening States with equally full discussion of the questions affecting the States, and a very able and full brief, covering the construction of and the constitutional features of the several acts of Congress, has been filed by Mr. William B. Bosley, *amicus curiæ*.

It is, therefore, we think, peculiarly appropriate that this reply on behalf of appellant should be confined to a consideration of the arguments and authorities advanced by the Government without unnecessary repetition of authorities or rediscussion of the principles involved, but it will, of course, be understood that no admission is involved in a failure to refer or reply to any of the claims or arguments on behalf of the Government.

#### **Restatement of Fundamental Questions Involved.**

The brief on behalf of the Government recognizes that the fundamental questions of the constitutional rights and relations of the Federal Government and the public land States, which are set forth in our opening brief, pages 2 to 6, are before the court for decision and are involved, not only in connection with the ultimate decision of the case, but in connection also with the construction and effect of the acts of Congress referred to, and in connection with the interpretation of the decisions cited.

We regard it as of the highest importance that there shall be a clear and unqualified understanding as to the principles and issues of constitutional law that are to be determined, and the scope and effect thereof, because we observe throughout the brief on behalf of the Government a diligent effort in the direction of assuming and arguing, notwithstanding the claimed sovereign ownership and control of the public lands by the Federal Government and its right

to exclude any uses thereover or encroachments thereon by the States, that nevertheless no serious impairment of State equality is involved.

With the design of getting the position and contentions of counsel for the Government on this important phase of the subject before the court in connected detail and with fullness, we here quote brief extracts from various pages of the Government's brief, as follows:

At pages 25 and 26, after referring to the claims made on behalf of the States and to questions of conflicting authority, it is said, at page 25,

"and whether the United States is supreme in all of its constitutional contacts, or in some of them is dominated by the control of an *inferior sovereignty*,"

and, after further comments, the brief proceeds, at page 26:

"that the subordination of the United States to the State in any respect is, constitutionally speaking, inconceivable; and that these several propositions rest on doctrine which has been solidly and immutably laid down by this court in many cases."

Discussing the act of 1866 in the heading, it is further stated, page 27:

"Congress was left free to change the policy, repeal or amend the act, and thus withdraw the public domain and the water upon it from the influence of these subordinate regulations."

And, further discussing the act of 1866 and the effect of the local customs, rules, and laws, it is said, page 28:

"and all subject, of course, to the underlying rights and dormant powers of the United States as the owner of all the property concerned."

Discussing the nature of the title of the United States to the public lands, it is said, page 123:

"As the tenure by which the lands are held is quite independent of the State and as the title is vested in trust for all the people, attended by a constitutional grant of disposing and controlling power, given in express terms without any limitation, it is impossible to conceive of this property as being subject, while it remains in the United States, to the laws of another and inferior sovereign."

And, further, at page 123:

"The fallacy results first from a failure to understand that the powers of a State are not such as would inhere in an independent sovereignty, but only such as remain after deducting all the express and implied powers which the people granted to the general Government; and, secondly, *from confounding the existence of a State power with the opportunity to exercise it.*

"The national property is excepted from the power of all States alike."

And, at page 125:

"Properly speaking, the United States does not ever hold property in a private capacity, but always for public objects."

Also, at page 127:

"To deny the right to take such lands while they remain Federal property is not to deny the State's powers of eminent domain, but merely to limit, in favor of the *superior right of the United States*, the things upon which it may operate. In refusing to dispose of the land or to permit the State to do so, Congress is not destroying any necessary function of the State government. Practically Congress could not work such a result in that purely passive or negative way."

Referring to compensation by the State to the Federal Government for uses over the public lands, we quote from page 132:

"Assuming the State must compensate, how would the courts estimate the compensation *for impairment or destruction of a policy of Congress?*"

And, on page 133:

"The power claimed for the State would be absolutely incompatible with the power of Congress. The policy of the State might, and in all probability would, differ radically from the policy of Congress respecting the use of the land and its resources. Intolerable conflict and confusion would result. The subject-matter is not such as to admit of a divided control."

Without pausing here to discuss the same, the issue thus presented by the Government is in substance to the effect that, while theoretically, and, in other respects, we may assume universally, there was reserved to the States the right to establish and continue local self-government adequate for the protection of and equal to all of the needs of the inhabitants of a State, including the right to acquire by eminent domain or otherwise all necessary public ways, uses, rights and properties for the development of the resources of the State, the carrying on of the government of the State, and the industries of the people, this assumed equal and sovereign power of the States is subordinate and subject in those States wherein public lands are owned by the United States Government to the power of Congress to adopt rules and regulations concerning the public lands and other properties of the United States, and that this granted power in Congress is not a right in property and is in no manner subject to the aforementioned rights of the States, but is a sovereign right of government to which the rights of the State must yield, being inferior thereto, and that a State may therefore carry on its functions and develop its resources by virtue of the favor, acquiescence, or condescension of Congress and not as a matter of right, as may be done in all States where no public lands exist.

It is argued that, this being a granted power of government, it must be assumed that it will be justly and moderately exercised and not abused. The argument thus advanced begs the question in its entirety, since it is equally clear that it might be assumed, if the outright and direct power was granted to Congress to discriminate as between States and their respective rights, either in connection with the admission of a State or by a later act of Congress, that it would be presumed that Congress would exercise it with justice and moderation; although it would be perfectly clear that, consistent with the controlling and underlying principle involved in the creation of our Government and in the equality of citizenship and the right of all citizens, the only moderate and just way that Congress could deal with such a power would be not to exercise it at all. It is equally clear, if such a right to provide for inequality has been conferred upon Congress and does exist in connection with the Federal ownership of the public lands, that the only way such a right could be exercised, consistent with the fundamental ideas of government above referred to, would be never to assert such power at all.

It should be noted and observed that, if the presumed sovereign right of Congress in connection with the public lands is assumed to exist as claimed, and if the presumption of the just and moderate exercise of such a right must be indulged in, it is equally clear, if our contention is sound and fundamentally right that the reserved powers of the States in the respects above referred to is a paramount constitutional power of government, necessary to the existence of and the equality of the State, that correspondingly the presumption exists that such reserved powers will be justly and moderately exercised and so as not to interfere with any of the granted powers of the Federal Government. And it may be added that the exercise of such essential rights by the State could by no possibility interfere with any of

the powers of the Federal Government involved in the scheme of government provided for by the Constitution.

Obviously, therefore, if, as now contended on behalf of the Government, there exists a possible conflict between the constitutional powers of the Government as owner of the public lands and the reserved sovereign rights of the States to equality and to development of their necessary public ways, uses and resources, the question is not whether the one or the other power would be justly and reasonably exercised, but it is as to where the power really lies and as to what is the true interpretation of the Constitution.

Not for the purpose of rearguing the same, but for the purpose of having them read in conjunction with and opposition to the statements and arguments asserted in the brief on behalf of the Government, we here requote certain brief but applicable extracts from the decision of this court quoted in the opening brief on behalf of this appellant:

From *Pollard's Lessee vs. Hagan*, 3 How., 212 (Brief, page 53):

"We, therefore, think the United States hold the public lands within the new States by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new States, for that particular purpose."

From *Veazie vs. Moor*, 14 How., 568 (Brief, pages 55-56):

"The design and object of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies, or local and partial interests might be disposed to introduce and maintain."



From *Withers vs. Buckley*, 20 How., 84 (Brief, page 58):

"Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied. Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guaranteed by the very nature of the Federal compact. Obviously, and it may be said primarily, among the incidents of that equality is the right to make improvements in the rivers, water-courses, and highways, situated within the State."

From *Escanaba Company vs. Chicago*, 106 U. S., 678 (Brief, page 59):

"On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them."

From *Ward vs. Race Horse*, 163 U. S., 504 (Brief, page 61):

"Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence."

From *United States vs. Railroad Bridge Co.*, 6 McLean, 517 (Brief, page 66):

"It is difficult to perceive on what principle the mere ownership of land by the General Government within a State should prohibit the exercise of the sovereign power of the State in so important a matter as the easements named."

From *People vs. Shearer*, 30 Cal., 658 (Brief, page 71):

"The relation of the United States to the public lands since the admission of California into the Union

is simply proprietary—that of an owner of the lands, like any citizen who owns lands, and not that of a municipal sovereignty.”

From *Mobile vs. Eslava*, 16 Pet., 253 (Brief, page 73) :

“The original States possessing this interest in the waters within their jurisdictional limits, the new States cannot stand upon an equal footing with them as members of the Union if the United States still retain over their navigable waters any other right than is necessary to the exercise of its constitutional powers.”

From *Illinois R. R. Co. vs. Illinois*, 146 U. S., 434 (Brief, page 74) :

“There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits.”

From *Kansas vs. Colorado*, 206 U. S., 46 (Brief, page 79) :

“One cardinal rule underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.”

From *Coyle vs. Smith*, 221 U. S., 559 (Brief, page 82) :

“‘This Union’ was and is a union of States, equal in power, dignity and authority, each competent to exert the residuum of sovereignty not delegated to the United States by the Constitution itself.”

#### **Comment on the Government's Introductory Statements.**

Counsel for the Government states that, “The object of these suits is to test the legality of the occupancy and user in each case, and, if legality be found wanting, to require

the defendants to conform with the legislation of Congress or, at their option, remove from the Government lands." (Gov't Brief, page 2.)

And after referring to the cases in 209th Federal and 230th Federal, and stating that the only act of Congress under which the land of the United States may be occupied and used for commercial power enterprises is the act of February 15, 1901, counsel states, "In these cases it is conceded that no such permission had been sought or granted. The defendants are at liberty to seek the protection of that law if they see fit to do so, thus following the example set by many other similar enterprises." (Gov't Brief, page 3.)

Counsel for the Government then proceed further to argue that the views contended for would soon operate to place every valuable power site on the public lands and reservations of the West in the ownership of power corporations and thus destroy at one blow an important element in the plan of conservation, and it is further asserted that the defendants, instead of being abused and misled by the Government, have been treated by it with exceeding patience, etc. (Gov't Brief, page 3.)

These suggestions require but brief rejoinder. So far as the record is concerned the defendants are to be ejected and their property on the public lands confiscated or destroyed and their water rights rendered impossible of use or enjoyment and the people of the State of Utah deprived of the public service now enjoyed thereunder.

It is, of course, a mere matter of inference that the Government when once the power to eject and destroy is finally adjudged to it (if such judgment is ever rendered), will, upon some terms or conditions suited to its sovereign pleasure, permit the further occupation and enjoyment of these purposes and uses. However, the present rules and regulations, which are discussed at length in our opening briefs, furnish only an illustration of what may or may not be exacted. If vested with the right of ejection and the

sovereign powers of government, the United States may take whatever course or action it may desire, ranging either from allowing a continued occupancy under the present rules of the Department, or such modified rules as may be in force at the time, to and including absolute ejection of the defendants or the imposition of such other conditions or penalties as the departmental mind may deem appropriate at the time.

It is asserted that the defendants are at liberty to seek the protection of the law, but in this case it will be observed that the law is one thing and the rules of the Department are another.

The further assertion that a decision in favor of the defendants would soon operate to place every valuable power site in the West in the ownership of power corporations and thus destroy the plan of conservation calls for but passing comment at this time. Unless the plan of conservation contemplates the exercise of governmental powers that cannot be exercised by the Government of the United States under the Constitution, then it may be submitted that nothing will be destroyed or impaired at all. Surely it is not proposed to prevent the development of or to destroy, if developed, beneficial uses of water and resources such as are here involved, and if this is so, and if the powers of the United States Government and the several States are adequate for the purposes of government and for the protection of the people and the resources of the country, then nothing whatever will be destroyed or impaired; but, upon the contrary, the development of the water powers of the country and correspondingly the conservation of the resources of the nation will be very largely improved and extended.

It is further worthy of consideration that each and all of the uses here involved, and in fact all similar uses in the West, are now public uses and agencies fully subject to the control and regulation of the States both as to rates and service and that no monopolization or abuse of these powers

is possible; and also if any such use is interstate in any such a way as to amount to interstate commerce, then the powers of Congress can be, and doubtless will be, asserted so that no present or future monopoly or withholding of use, service or enjoyment or the exaction of excessive rates or the waste of any resources will be possible. In fact, the withholding, the monopolization or the misuse of any of these resources or industries is a mere groundless fiction and, no matter in what form or manner urged, could afford no justification for a violation of the elementary principles of constitutional law as applied to the nation and the various States.

It is asserted that defendants have had the amplest opportunity to comply with the law before these suits were instituted. This, however, while alleged in the complaint, is denied in the answer, and the real situation that appears from the pleadings is that the defendants were required either to submit to the rules, regulations, and use agreements of the Department or else vacate the premises or defend these suits, and the rules, regulations, and use agreements referred to are set forth in the answers and are therein and now asserted to be illegal, null, and void.

At page 155 of the Government's brief it is asserted that, where we alleged that the charges sought to be imposed under the departmental rules and regulations are "unreasonable and unlawful," we apparently mean that they are "unreasonable because unlawful." We find no reason assigned, however, why, when the words "*unreasonable and unlawful*" are used, they are not presumed to mean what is plainly and unequivocally stated, that is to say, that the regulations are *unreasonable in fact* as well as unlawful.

The invalidity and unreasonableness of the regulations, including charges, is not only specifically alleged, but also the claim that they are unauthorized and, therefore, illegal is asserted; and, there being no issue of fact raised upon the pleadings, obviously they are admitted to be unreasonable, unless the departmental authority has been authorized by

the Federal Government to make rules, regulations, and charges without limitation or restraint, and unless, as contended, the State and their public service agencies have no rights or interests which the Government or its administrative agencies are required to respect.

### **The Pleadings.**

As to the criticisms of the answer, we had assumed that the rules of pleading were pretty well understood and would hardly necessitate exchanges between counsel, and we only protest that where matters are categorically denied in the answer and not elsewhere admitted, and where new matter is specifically alleged therein, that such allegations are, in so far as material, to be accepted as unquestioned facts in the case and are not to be disregarded. Of course, if they are irrelevant, their appearance in the pleadings signifies nothing, but if they are relevant and are not denied, they can hardly be properly catalogued as "self-evidently untrue."

Commenting on that portion of the answer that alleges that the present regulations governing the administration of the act of 1901 are unreasonable and void, counsel for the Government says:

"These also, even if they were well grounded, would be of no present interest while the defendants refuse to legalize their intrusion by applying for permits. When they do this they will be in a position to question the legality of the stipulation and regulations sought to be imposed upon them, but plainly not before" (Gov't Brief, page 6).

We are not prepared to concede that the assertions just quoted are either plainly or otherwise tenable. The defendant, with the admitted acquiescence and consent of the Government, was in the quiet, open, and undisputed possession of property being operated under and consistent with the laws of the State of Utah, and it would appear to us, if it is thereafter to be put in the position of a trespasser,

assuming that this is possible, that the only way this could be done would be to demand that it submit to lawful and enforceable rules and regulations and enter into lawful agreements if any are called for. Plainly, it would seem to us, the Government cannot change an entry, made with its acquiescence and consent and an occupation theretofore lawfully continued, into a trespass by demanding that the defendant enter into written agreements containing stipulations and conditions wholly unauthorized and unjustified by law and to which the defendant is in no manner bound to subscribe.

It might here be observed in passing that, while the Government asserts that all the defendant has to do to remain in possession of its properties and in the enjoyment of its water rights and in the continuation of the public use is to acquiesce in and subscribe to certain rules, regulations, and use agreements (which is claimed to be a very simple requirement), the defendant is required, by these same rules, regulations, and use agreements and the departmental interpretations of the law therein set forth, and as a condition of so staying in possession, to stipulate over its own signature that upon notice and demand it will surrender and vacate the property upon revocation of its so-called permits by departmental authority, which right of revocation is claimed as unlimited and can be exercised at any time.

That such a situation or such a condition or such a demand represents anything either lawful, equitable or reasonable would hardly be contended by any one upon a clear statement and a full understanding of the situation.

Counsel for the Government also discusses the details of the answer as to defendants' water rights and assumes that some questions may be raised concerning their validity, but we think that this is not so under the pleading.

The acquisition of water rights vested prior to the installation of the present power development and as early as the year 1895 is alleged, and their application to the existing uses is also alleged. It is altogether clear that such existing



beneficial uses of water and the right thereto can be acquired and the place and method of use changed. This is true in Utah and, as we understand, in all of the public land irrigation States.

The answer further alleges the application and beneficial use of these waters to the present public-service enterprise for a number of years before this action or any hostile claim or procedure by the Government and with its full acquiescence and consent, all of which is admitted in the record.

The answer further alleges and it is admitted that the defendant has become vested with certain other water rights, to the utilization of which the works here in question are necessary, and that such water rights were initiated and the said works commenced prior to the establishment of the permanent reserve.

Counsel for the Government seems to find inconsistency in our statement that these rights had been initiated and the construction of the necessary works commenced prior to two different dates in the year 1905, but this confusion can only arise from failure to bear in mind that the development of an extensive public-service enterprise and the application of the water connected therewith to a beneficial use is necessarily a matter of considerable time, and that, under State laws, water rights, whether they be water rights existing and acquired and applied or whether they be water rights in course of acquisition by original appropriation, are necessarily protected during such periods.

We are not here, as is assumed, trying an action wherein a water right is in dispute or where any detail as to quantity or as to the exact time of initiating the right is involved or is material, nor is the exact chain of title by which the rights become vested in the present defendant of any importance. Clearly, in this case, where the only material question is the existence of water rights for the enjoyment of which the right of way is indispensably necessary, all that could be required would be to allege, as the defendants have done, perhaps with unnecessary fullness, the possession and use of

vested water rights, and that the possession and enjoyment of the rights of way in dispute are essential to their continued beneficial use and to the continuation of the public service, with which such use is connected.

In this connection counsel for the Government lose sight of the fact of controlling importance, which is not only undenied in the pleadings, but is undisputed, that the water is not only being devoted to a beneficial use, but that such use is a public use essential to the State of Utah and its inhabitants, and we know of no authorities to the contrary, and none are cited that the appropriation and use of water devoted to such public purposes can ever be questioned or the use thereof withdrawn.

The sole question that could be raised in connection with such a situation, even if the water right and the right of way had not otherwise vested, would be as to the assessment and recovery of damages. But here the vesting of the water right is alleged and admitted, and the only question is: Has the Government such a peculiar and indefeasible title that it may take away and destroy the rights of way over its lands, although admittedly necessary and indispensable to the public use?

### **Reply to the Government's Contentions Respecting the Act of 1866.**

It is asserted that the act of 1866 (R. S., 2339) does not apply to forest reservations, and this is done as follows (Government Brief, p. 19):

"Although according to the settled principles of construction, it relates only to vacant public lands, the defendants wherever necessary in these cases would have it apply to forest reservations as well."

While this is stated to be a settled principle of construction, we think that a thorough examination of the statutes and a consideration of the situation will demonstrate that the contention has little, if any, foundation for its support.

There have been some acts of Congress, like the act of 1891 and amendments thereto, that have been designed to define and grant certain rights of way prior to construction so that such rights could by specific description of the lands involved become matters of record instead of being reserved under general laws consistent with the provision of R. S., 2339 and 2340. Nevertheless there never has been and is not now any other specific statutory general provision applicable as confirmatory of rights of way wherever and whenever the water has been appropriated and the beneficial use thereof commenced and continued consistent with State laws. Therefore the assumption that the act of 1866 is not applicable to forest reservations would seem to imply that uses and developments of water within forest reservations, no matter how extensive and important and no matter how necessary their continued use, would vest, if at all, not under an act of Congress, but only consistent with the general principles of law that presume all such easements to be irrevocable. And the departmental construction of the act of 1901 and the provision thereof that the permit shall not imply any right or easement, but shall be subject to revocation, construes that act as designed to repeal even this wholesome principle and to render all developments subject to revocation and destruction at any time.

Not only do the specific provisions of the Forest Reserve Act refute any claim or contention that the act of 1866 is not applicable in such reserves, but in substance the act itself re-enacts the act of 1866 or contains language equivalent to an expression of the understanding that it shall be applicable in such forest reservations, and we therefore wholly deny the contention that the act of 1866 is not applicable in forest reserves.

The utmost that can rationally be contended with relation to the act of 1901 is that the officers of the Government in charge of such reserves are to exercise certain supervisory power as to the location of works designed for the appropriation and beneficial use of water within forest reserves.

Neither that act, nor any other, at all indicates that there shall be any regulations or supervision that will prevent or impede to any extent whatever the appropriation or beneficial use of water in such reserves, and as we have already fully shown any such regulations or supervision preventing or placing burdens upon such necessary public ways and uses would be in excess of the authority of Congress.

Upon the contrary, the declared purpose of the establishment and creation of forest reserves was for the protection of timber and other growth and the protection and continuation of conditions that would conserve and protect the flow of streams and the continued supply of water within such forest reserves, not for any governmental purposes of the United States Government, but as an adaptation upon its part in aid of the development and use of water flowing within such reserves.

To say that the Forest Reserve Act, or any other act of Congress, was designed to prevent, interfere with or impede or place burdens or charges upon the appropriation of water, is wholly contrary to the spirit and the letter of the law and to the declared and obvious purpose for which such reserves were created.

If the purpose of Congress was, as stated, to conserve and develop the supply of water and to permit its appropriation and use, then as an indispensable and inseparable part of such policy, the provision of law must remain in effect that such uses once inaugurated and established, frequently at enormous expense and demanding perpetual service, shall be acknowledged, confirmed and continued.

That a reserve power of destruction on the part of the Federal Government has been contended for in certain quarters, is not denied, but it is specifically asserted that there is no support for any such a contention in any act of Congress and it is asserted as undeniable that any such a provision construed to apply to vested water rights and indispensable permanent public uses would be necessarily

void and in excess of the powers of the Federal Government as proprietor of the public lands within a State.

It is very clear that forest reserves, as such, are a mere matter of policy of the Federal Government designed to meet local needs and conditions, and are not reservations of the Government in the sense that they are set apart for any governmental purpose of the United States.

If these considerations were not in and of themselves controlling, it would be necessary only to point out that the Constitution in its operation is to be interpreted under and in connection with the scope and purpose of government, National and State, as they existed at the time of the adoption of the Constitution.

Manifestly it was never thought, understood or intended by anyone at the time of the adoption of the Constitution that the United States Government for its own purpose or for any other purpose, would create forest reserves, much less that through the creation of such reserves it would assert any exceptional rights or privileges or powers of charging or taxation or place any burdens or restrictions upon the State. All of which is of course self-evident.

In the important case of *South Carolina vs. The United States*, 199 U. S., 437, these principles are discussed and very clearly stated, as follows:

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its scope all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded."

And further, and very appropriately answering certain arguments here made or at least freely intimated by the Assistant Attorney General on behalf of the Government, the court there said:

"Any other rule or construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day."

While deciding the question involved in that case upon the principle stated, the court also in the same case, very distinctly stated the converse of this same proposition on behalf of the States as follows:

"Among those matters which are implied though not expressed, is that the nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of article 6 of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it."

"In other words, the two governments—National and State—are each to exercise their powers so as not to interfere with the free and safe exercise by the other of its powers."

In this case there was a very able dissenting opinion by Justice White, concurred in by two other justices. But the dissenting opinion fully supported the majority as to the quoted matter and dissented on grounds applicable to the States' control, amounting to a right of prohibition, over the business of producing, selling, or using liquor.

At page 36 of the Government's brief authorities are cited that are alleged to sustain the rule, "That an act like this" (referring to the act of 1866), "disposing of interests in the public domain, will not be construed to affect lands which have been or may be reserved from the operations of the general land laws."

This, of course, refers to the disposal of lands, and we are not familiar with any decision that could be cited, nor do we think that any exists, that the reserval of lands for forestry or other like purposes withdraws the same from the application of right of way laws which are equally and as essentially applicable, whether the lands are reserved or unreserved. The lands may be withdrawn from disposition, but they cannot be and are not withdrawn from ways and uses indispensable to the State, and from which uses the United States Government could not withdraw the same. And we may add that it is obviously not intended to withdraw such lands from such uses.

We quote the following rather exaggerated paragraph from page 53 of the Government's brief:

"Here again we encounter the same absurdity mentioned above, but in an even more aggravated form. The right to take water must include the right to take land for a ditch, and the right to have a ditch necessarily carries with it as a mere incident the right to use it, and therein to occupy and enjoy whatever land may be employed in the uses the promoter may have in mind. By this progressive reasoning a claimant of a right to divert water might soon find himself in the possession and enjoyment of an entire forest reservation."

We may safely assume that such extravagant and exaggerated argument as this will not be found effective with the court.

States and individuals are not likely to build canals, aqueducts, reservoirs, power-houses, transmission lines, roads or other ways or uses, for the mere love of the work, or for the purpose of taking over "an entire forest reservation."

Obviously nothing of the kind would or could be done. What the State and its people may and will do on the Government land and in the forest reserves is those same rea-



sonable and indispensable things done by all of the States, and as to all lands and property within the State, and the United States Government will be in no position to be imposed upon nor have its property used or occupied except in ways essentially proper and under conditions confirmed by the laws of the State and justified by the necessity of the people of the State.

By asserting and establishing the right to essential and necessary uses, neither the State nor its people acquire or could claim the right to any excessive, unreasonable, or unnecessary uses, nor to use any property except those ways, easements, and occupancies recognized as indispensable to the development of a State or a country, and such as can in all other instances be acquired and asserted under the rules of eminent domain.

The scope and intention of the act of Congress is illustrated by the following paragraph, which we quote from page 69 of the Government's brief:

"The result of the above-stated conflict of statutes has produced the anomaly that while forest reserves are being set aside to preserve watersheds and increase the water supply, the same legislation has denied its use in and for the industries calculated to be benefited thereby. This bill corrects this condition by extending the opportunities to use these waters to mining, electrical, domestic, public, and any other beneficial uses."

Which quoted language is in strange contrast to the argument of counsel for the Government, that the acts of Congress recognizing and encouraging beneficial use of water were not designed, after the passage of the act under consideration, to be applicable to forest reserves.

Counsel for the Government further assert that the act of 1866 never did apply to any uses of the public lands for the development or enjoyment of water resources other than with respect to reservoirs and canals or equivalent flumes or

pipe lines. This latter construction appears to us not only to be far too narrow, but inconsistent with the language of the act itself.

It is, of course, true that at that date practically all of the requisite uses of water over the Government lands, as such uses were then practiced, were in connection with canals and reservoirs, or equivalent flumes and pipe lines. These at the time practically expressed all existing uses or necessities, but Congress comprehending and desiring to broadly cover the situation enacted as follows:

"That, whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

It will be observed that the foregoing quoted portion of the section is comprehensive and complete within itself and comprehends and includes all uses of water once established and rights of way therefor, and that the succeeding paragraph of the section is a mere declaration or acknowledgment as to future construction of ditches and canals and is as follows:

"and the right of way for the construction of ditches and canals for the purpose aforesaid is hereby acknowledged and confirmed."

It will thus be observed as to all beneficial uses of water, without distinction or discrimination, where the same is or shall become vested and accrued consistent with the local customs and the decisions of the courts, that the possessors and owners of such vested rights shall be maintained and protected in the same and separately and not as a grant, but as an acknowledgment, the right of way for the con-

struction of ditches and canals for the purpose aforesaid is acknowledged and confirmed.

Applying the same to this case, it appears from the admitted facts that by priority of possession the right to the use of the water in question has accrued and is vested for the purposes set forth in the complaint, and the act of Congress solemnly declares that in all such instances the possessors and owners of such vested right "shall be maintained and protected in the same." Nevertheless, and regardless of this definite and wholesome unrepealed act of Congress, it is proposed not only not to maintain and protect the defendants in the possession of these beneficial uses, but to eject them from the necessary rights of way and to destroy the water right and the public use.

This question of construction of the act could only arise in an instance where uses such as are here involved were desired to be constructed and the dispute arose at the time the construction was attempted or during the process of construction. But no such conflict of construction or question of right can be raised in a case like this, where the water has been appropriated to the beneficial use and the right to the use of the water is accrued and vested under the laws of the State of Utah and correspondingly the right to all essential rights of way therefor is confirmed and acknowledged.

It is asserted (Gov't Brief, p. 34) that "to infer from the general license to divert water and construct ditches the right to appropriate whatever public land might be required to use them in accordance with the plans of the proprietor, would be wholly indefensible."

If the Assistant Attorney General is here referring to acquiring lands of a general nature and not those essential public ways and occupancies requisite to the enjoyment of an acknowledged right, we would have no occasion to disagree with him.

We are not here discussing the acquisition of title to land nor of uses to land except such as are in their nature essential

and such as could be acquired from other owners than the United States by process of eminent domain. But within and subject to these limitations we are claiming that, where acts of Congress indicate and acknowledge the right to the appropriation and beneficial use of water in a given instance, all necessary rights of way in connection therewith are, where not directly included, included by necessary implication.

To what regions of absurdity are we driven if acts of Congress necessary to the enjoyment of waters in the public land States and providing therefor are nevertheless presumed not to include rights of way incident thereto and indispensable to the enjoyment thereof?

Without levity may we not inquire whether or not it is assumed that the United States Government is treating the interested States as a fox or a stork, and is serving them with supplies of water alternately placed in bottles for the fox and dishes for the stork, so that neither may use the same.

The case of *Cleary vs. Skiffich*, 28 Colo., 362, cited on page 35 of the Government's brief, if fully quoted on the point, illustrates exactly the distinction we have in mind. In quoting from this case, however, the Government's brief quotes therefrom as follows:

"The right might become appurtenant to that in connection with which it was beneficially used, but the latter could not be appurtenant to such right. It might as well be argued that because a vested right to the use of water had been acquired for irrigation purposes, that there attached to such right as an appurtenance, land upon which to apply the water, as to say, as in this instance, there passed with the water right land in connection with which such water was utilized."

The quoted matter, however, does not appear to us to fairly illustrate what is decided, and we therefore quote from the

opinion the following, which immediately precedes the matter above quoted and appearing in the Government's brief, namely:

"The theory of counsel for defendant is, that privileges and appurtenances properly belonging to the thing granted pass with it, and therefore, the right to the use of water being established sufficient land passed with that right upon which to beneficially apply the water so appropriated. It is true that the grant of a particular piece of property, in the absence of any limitation, carries with it those appurtenances necessary to the beneficial enjoyment of the property granted, which it is within the power of the grantor to convey. An appurtenance is that which belongs to something else as an adjunct or appendage of such moment that the thing to which it attaches cannot be enjoyed without its use; it is therefore limited to that which is *necessary*, to the enjoyment of the principal thing granted. *Nichols vs. Luce*, 24 Pick., 102. The appurtenance which could pass by virtue of the grant to a right to the use of water would be that necessary to its utilization, so that it could be applied to the purpose for which it was appropriated."

The argument, which appears to have been seriously presented, that the right to the use of water being established, sufficient land passed with it upon which to beneficially apply the water, was certainly sufficiently novel, and we do not recall any other instance of the assertion of such a claim. Upon the contrary, it is a very familiar rule of construction, and a rule clearly sustained by the language above quoted, that if, as between property owners, the right to appropriate a given quantity of water is acknowledged, and if for the utilization of its acknowledged and granted right the right of way over the grantor's lands is necessary, such right of way is correspondingly implied. As stated, "It is therefore limited to that which is necessary to the enjoyment of the principal thing granted."

It clearly follows, if the right to the beneficial use of water

is either acknowledged or granted, and the right of way over the Government's lands for ditches and canals for its utilization is also acknowledged or granted, that whatever is necessary to the enjoyment of the principal thing, and for the application of the same to a beneficial use, goes with the acknowledged right or the granted right, and unless such a construction is adopted we would have a case of an acknowledged or granted right, in this instance not only to the water but to the canal for its appropriation and use, and yet a denial of its use, which upon principle and authority is never permissible.

Further quoting, and expressing exactly what we mean :

"The appurtenance which could pass by virtue of the grant to a right to the use of water would be that necessary to its utilization, so that it could be applied to the purpose for which it was appropriated."

The thing essential to the rights of the States and the development of their public uses and resources is not acquisition of areas of land upon which to use water or other areas of land. Nor is it essential that the Government shall "dispose of" any of its lands provided that the constitutional and indispensable right is recognized in the State, either with the concurrence of the Government or without such concurrence, to occupy and use those essential ways and easements over the public lands which it could as to all other lands acquire by the processes of eminent domain.

This right is essential to the very existence of the State, to the development of its resources and to the enjoyment of its waters, and it does not imply nor compel any disposition by the Government of its lands or any taking from it of its lands by the States, but it does provide that the Government may not deny to a State the development of its public resources.

The matters in controversy are the rights of way and uses necessary in connection with the appropriation of water in

its natural flow, and the application of the same to beneficial use, and so that what is necessary and indispensable to be done from the point of appropriation to the point of delivery to the ultimate consumer, may be done; and no such claim is made as in the Colorado case cited, that lands necessary upon which to apply the water are included or affected.

The questions in this case are questions of a public nature, and they are too large, clear and important to be confused with or contradicted by claims of a private nature, and involving the claimed acquisition of title to areas of land as distinguished from ways and uses acquirable in actions of eminent domain.

It is in connection with, and as limited by, these considerations that we assert that under the act of 1866, and in connection with all later acts, all rights and easements over the Government lands essential to the beneficial appropriation and use of water are necessarily acknowledged and confirmed.

### **Reply to the Government's Contentions Concerning the Acts of Congress.**

In the brief on behalf of the Government there is a fairly extended discussion on the question of the construction of the various acts of Congress.

After carefully reviewing this discussion, however, we are satisfied that the subject is fully covered by the arguments and authority contained in our opening brief, the brief filed on behalf of the States, and the brief filed *amicus curiæ* by Mr. William B. Bosley. We will, therefore, except for certain matters which we have already discussed concerning the construction of the act of 1866, and except that we desire to call the attention of the court to certain errors which we think have occurred in connection with the supposed scope and intent of the act of 1896, and also to certain references to the debates and occurrences in Congress in connection with the passage of the



act of 1901, submit the construction of the acts of Congress on the arguments and authorities already made and cited.

The act of May 14, 1896, having been made the basis of the decision of the appellate court of the eighth circuit in the case referred to and reported in 209 Fed., was thoroughly discussed and analyzed in our opening brief, with especial relation to the theory that this act had repealed or, so far as electrical developments were concerned, had been substituted for the act of 1866, and we thoroughly argued and cited authorities, showing that in no event could this act have repealed or been substituted for the act of 1866.

We further fully argued and cited authorities upon the proposition that if, as decided by the Circuit Court of Appeals of the Eighth Circuit, the act of 1896—and in this connection including the act of 1901—stood alone and was in substitution for and not in aid of prior laws, the same was clearly unconstitutional.

This argument as to constitutionality has not been answered or replied to in the Government's briefs, and since we cannot assume that an argument so seriously made and so well supported by authority was either overlooked or considered as unimportant, we have a right to assume that the attorneys for the United States recognize the force and validity of this contention.

Obviously, if this contention is sound, as we believe it to be, and if the acts of 1896 and 1901 are to be regarded as merely supplemental to the prior acts and not in substitution therefor, then and of course the entire groundwork and foundation is taken out of the decision of the appellate court of the eighth circuit, and the conclusions reached in the cases in 209 Fed. and the 230 Fed., cited in the briefs, would be unsustained and necessarily a different decision, and one in favor of the defendants would be rendered.

While it is stated that the Government does not contend that the act of 1866, section 2339, of the Revised Statutes, has been wholly repealed, it is very evident that if the act of

1896 had the effect to repeal or to substitute the act of 1896 for the act of 1866 with respect to electrical developments, then the unavoidable effect of the act of 1901 covering all beneficial uses of water would be to entirely repeal the act of 1866.

We are not desirous of enlarging upon the discussion of the question of repeal of the act of 1866 by the act of 1896 or the substitution of the latter act for the former in the particulars referred to by the Circuit Court of Appeals, except to point out certain obvious errors and misunderstandings upon which the opinion of the Circuit Court of Appeals was predicated.

Without quoting the language, it was actually assumed by the Circuit Court of Appeals that in passing the act of 1896 Congress took the matter up in a very comprehensive way, and it was planned and designed in a governmental sense to take over and control the important and developing industry of the generation of electric power wherever the public lands were occupied or used in the development of such industry.

In fact, in this connection the growing needs of the country, the public tendency and intention in connection with this subject, and the understood design and purpose of Congress to take over and control and regulate this matter in a governmental sense, is elaborately discussed by the Circuit Court of Appeals, and such considerations are made the basis of its opinion holding that the act of 1896 replaces, in the respects referred to, the act of 1866.

Clearly, there is nothing in the act of 1896 that indicates any intention to repeal any prior act or to substitute the act of 1896 for any other act or any other law. It is, as pointed out in our opening brief, entirely supplementary and consistent with existing law.

However, since the preparation of appellant's original brief, we have examined the subject still further, including the report of the committee of the House, 54th Congress, first session, Report No. 26.

The report proper is very brief, and outside of general formalities of statement contains but one statement as to the reason for the passage of this law, and there is submitted therewith a report of the Secretary of the Interior and an accompanying report of the Commissioner of the General Land Office. These departmental reports discussed the question as to whether the act should be passed as an amendment of the act of 1891 or as an amendment of the act of 1895, and the Commissioner recommended that it should be adopted as an amendment to the latter act because of the policy expressed in a proviso in section 18 of the act of 1891 that the privilege therein granted shall not be construed to interfere with the control of water for irrigation and other purposes under the authority of the respective States or Territories, and some of the States and Territories having by law given preference to domestic and agricultural uses of water over others—that is to say, Colorado, Utah, Idaho, and South Dakota—the permission to use the public land for carrying water for miscellaneous purposes should accordingly be allowed in such manner as not to interfere with the control by local law. Therefore, this extension of the use of such easement should be under the full control of the Department, so that it would not conflict with the local laws.

It will therefore be seen that the law was not passed for the purpose of taking over the control of these industries or water appropriations by the National Government, but in express deference to local law.

Coming now to the purpose of Congress as stated in the passage of the act, we find the following reasons stated in full for its passage:

“In California and elsewhere the small towns and cities located in the valleys can utilize electric light and power at minimum cost if allowed the right of way across the Government lands in the foothills of the mountains as this bill permits.”

When we consider the momentous importance and sig-

nificance of the subject and the importance of the act of 1866, and that the appropriation, development, and use of water should remain under consistent laws, and that a right once acquired, being of an indispensable private and generally of an indispensable public nature, should, after beneficial use was once commenced, be continuous, it is a very serious matter that a court so able and important as the court of the Eighth Appellate Circuit should render an opinion holding that so important a law as the act of 1866 had been substituted and in effect repealed as to a great industry when, as a matter of fact, the records demonstrate that the idea and intention assumed were never discussed, considered or acted upon by Congress even in the most remote way.

The whole fabric upon which the substitution of the act of 1896 and the corresponding implied repeal in part of the act of 1866 is predicated is entirely false, void, and non-existent, and since it is admitted that there is nothing in the act that shows the intention to repeal, and since it appears without dispute from the records that the intention ascribed to Congress never did exist, and that the discussion and design assumed to have taken place nowhere appeared or ever happened, there ought to be an absolute abandonment of the theory and argument that either the act of 1896 or the act of 1901 was designed to or did repeal in whole or in part the act of 1866.

Certain extensive extracts from the debates at the time of the passage of the act of 1901 are inserted in the record as the basis for an argument that it was not designed or intended that any permanent rights should be acquired under the terms therein provided for.

A careful reading and consideration of these debates, however, will demonstrate that the inquiries and answers, while superficially they might be assumed to sustain the position of the Government, were directed at the question as to whether or not the legal effect of the act would be to give the corporations or individuals referred to permanent rights in the form of a grant.

This, of course, it was correctly stated the act would not do.

However, we must presume that every member of Congress knew of the act of 1866 and its recognition that all water rights vested and accrued under State laws should be maintained and protected, and the question was not as to whether this law should continue, but was as to whether a new granting act was being passed; and it was correctly stated that no grant was included and the permission should be subject to revocation at any time.

However, there was no discussion or consideration of any theory that any existing law was being repealed or that the act of 1866 was to be repealed or superseded, or that accrued and vested water rights were nevertheless subject to be destroyed under the act of 1901. This construction finds no support in the act itself or in any debates or discussions occurring in connection with its passage or elsewhere, except in departmental rulings, which, we respectfully insist, have been contrary to the settled principles of law and obviously destructive of rights the continued existence of which is necessary not only for the rightful protection of public property, but equally and clearly necessary in the public interest as well.

If, during the course of the consideration and debates quoted from, some one had inquired if the act of 1866 was being repealed and if vested and accrued water rights could, after the passage of this act, be destroyed, and some one in authority had stated that such was the effect of the act of 1901, it takes no especially vivid imagination to realize what would have happened; and we can be assured that the very people who proposed these laws and were interested in and advocated their passage would have been the first to oppose them if it had even been intimated that the act of 1866 was designed to be repealed or in any manner emasculated or impaired.

It is quite true that the Department of the Interior desired and recommended the passage of the act of 1901 so that

there could be a consistent administration of the land laws in connection with the uses referred to in this act.

In this connection also counsel for the Government assumed too much and assumed that by the passage of mere administrative and supervisory laws there was a design or intention in whole or in part to repeal existing and fundamental laws.

It was entirely appropriate, if there was to be administrative regulation as to the occupancy and location of uses on the public lands, that there should be one harmonious act covering said supervision. However, it is not necessary to assume—on the contrary, it is wholly improper to assume—that those laws which previously had been passed and were in the nature of recognition of constitutional principles and indispensable to the development of the resources of the public land States, were being abrogated or repealed. Nobody proposed, nobody advocated, nobody intended that any such thing should be done, and it is a purely gratuitous departmental and illegal construction that argues and insists that what was neither expressed nor designed has been accomplished, and that uses essentially permanent and expensive of installation and indispensable to the public welfare cannot be regarded as accrued or vested or maintained or protected rights, but are subject wholly to the whim and caprice of departmental authority restrained by no law and guided by no law.

Not only did not Congress ever attempt to do this but, as stated in one of the opinions of this court, if Congress could be shown to have ever intended any such result, its power in that connection could be “confidently denied.”

In their opening brief appellant placed before this court in very full detail the departmental rules and regulations, and use agreements to which the defendants were asked to subscribe as a condition to their remaining in possession of their property and the public use which they are carrying on.

Strangely, it seems to us, counsel for the Government

did not undertake to discuss or to defend the regulations under consideration, although they seem to us indispensable to their case, and we assume that this amounts to a tacit admission that the regulations are unauthorized and therefore unlawful, which is equivalent to an admission that the judgment in this case should be reversed.

However, we observe that counsel content themselves with saying merely that we cannot question the propriety or authorized legality of these regulations until we ask for a permit. Just why this is so is not explained, and we think we may therefore assume that a citizen of the United States within a State, in the lawful, peaceable, occupation and use of property, under the acquiescence and with the consent of the United States, and also under the authorization and approval of the State and its laws, cannot be made a trespasser and the property so operated and essential to the public service treated as a nuisance where the attitude of the Government is that the occupant, as a condition of remaining in possession, must subscribe and possibly be bound by rules and regulations not only wholly unauthorized by any law of Congress, but wholly outside of the scope, jurisdiction, and constitutional functions of the Federal Government.

In this connection we direct attention to the pertinent remarks of the present Chief Justice in the case of *Daniels vs. Wagner*, 237 U. S., page 558, as follows:

"That although Congress may have the power to provide for the disposition of public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in an administrative officer appointed for the purpose of giving effect to the law."

We pause here to assert a principle that we regard as of



paramount importance, not only applicable to the decision in this case, but of vastly more importance in its general scope and application.

Assume for the consideration we are now suggesting, but for that consideration only, that the public lands are held by the United States under constitutional grant, and that Congress has sole and exclusive power not only as to their protection and disposition, but as to any uses or privileges enjoyed thereover. Also, necessarily assume that a State, wherein public lands are situated, although admitted into the Union, can have no uses or privileges thereover, even of necessity, although involving the very existence of the State.

Assuming all of these things, we may inquire what warrant or justification would exist for the United States Government asserting or enjoying or exercising over citizens of such States or the industries of such a State any general governmental powers not provided in the Constitution and which could not be exercised or carried forward in a State where there are no public lands.

It is sufficiently surprising that an executive of the Federal Government should assume, as is done in the rules and regulations, to regulate monopolies and exercise and provide for the conditions under which eminent domain shall be practiced and under which the United States might acquire and own a power plant for non-governmental purposes and other like, and, it appears to us equally preposterous, attempts to exercise non-constitutional Federal authority within the State.

This is constitutionally surprising, but the Assistant Attorney General comes to the rescue, and while not defending these particularly obnoxious regulations and assertions of authority does assume a similar attitude, and does assume that as a corollary of its asserted absolute control over the public lands and the right to withhold essential uses of the State thereover, the Government of the United States as a condition of permitting such uses, possessing the power of

absolute refusal, can and should assert powers of Government that do not exist in and which are not granted to it by the Constitution of the United States, and which are not even pretended to be so granted, and that the same can be asserted within a State so long as they relate to persons, properties, or industries coming in contact with the public land.

Whatever difficulties may be involved in connection with the decision of other questions in this case, we may submit that it is a matter settled by the decisions of this court beyond recall or cavil that the United States Government is a Government of granted powers; that it cannot exercise or enjoy or assert any powers of Government within any State that are not expressly granted to it as a power of Government under and in connection with the Constitution. And this by express and repeated decisions of this court quoted from in our opening brief has been applied to the public lands and the relation of the United States Government thereto, and it is held that under and in connection with these lands the United States Government cannot assert or exercise any powers of government.

However, in spite of and notwithstanding this obvious principle, and in spite of and notwithstanding the decisions of this court, we are again compelled to argue the question of an asserted right of the United States Government to insist upon agreements and procedure and provisions equivalent to the highest functions of government and amounting to laws of the most extended operation, including the asserted right of the United States Government to take over property and operate an industry wholly within a State and to regulate monopolies and the conduct of business not only on, but off of, the public lands and wholly within a State.

**Reply to the Government's Contentions Concerning the  
Validity of Defendants' Water Rights.**

Concerning the water rights of the defendants, it is asserted in the Government's brief in various forms and at various places that the defendants' water rights, having been initiated in alleged trespass on the Government lands (the trespass being alleged only in the brief), the same have not vested, and, therefore, that the defendant has no lawful interest either in the water appropriation or in the rights of way.

Ordinarily a seriously made contention has some colorable support either in law or in fact. However, with all due respect we are unable to discern that this contention has any support either in fact or in law.

In the first place, while there are some allegations in the bill sufficient to indicate that defendant had trespassed on the Government land, these allegations are specifically denied, and the defendant then categorically, specifically and in detail alleges the facts as to its entry on the land with the express permission, approval and acquiescence of the Government of the United States, and since upon this bill all of these allegations must be presumed to be true, and of course they are true, otherwise the Government would have denied the same, there exists no trespass upon the lands of the United States.

Further than this, since we think it is clear to demonstration that the rules and regulations and permit agreements of the Government are void and unauthorized by the act, and since the acts of Congress authorize and approve of entries, and since it is admitted that such rules were not insisted upon and the entry was allowed with the acquiescence and consent of the Government, it would seem clear to demonstration that the Government could not here seek to destroy a property in the lawful possession of, and being lawfully operated by, the defendant under the laws

of the State and under and in connection with which a lawful and essentially public service is being carried on, upon any strained and exaggerated theory of trespass.

Further than this, the question relates to the appropriation and acquisition of water and also as to whether or not, even if initiated in trespass upon the lands, under and in respect to the laws of Utah, the water right would not nevertheless and in any event be valid. This matter was decided by the Supreme Court of Utah in the case of *Patterson vs. Ryan*, 108 Pac., 1118. The adjudication of the court is sufficiently stated in the second subdivision of the syllabus, which we quote as follows:

"Trespassers upon land may acquire the exclusive right to the use of water, either to irrigate land or for other purposes, and, when such right is acquired, it is paramount to the rights of the true owner or claimant of the land, and the water claimant, when he is dispossessed of the land, may divert and use the water elsewhere, if he can so divert and use it."

We have already discussed the Government's theory that no uses over the Government land are recognized, or can be regarded as valid, except ditches, canals and other waterways mentioned in the act of 1866, and other uses occupied under permits granted consistent with the act of 1896, and after the passage of the act of 1901, under the latter act.

We have, also, pointed out the clearly indicated purpose of Congress that the waters within the forest reserves as well as those on the public lands should be available for beneficial use, and that by the act of 1866, wherever and whenever the beneficial use of water has accrued, such beneficial use is to be maintained and protected; and this excludes the idea that an entry for such purpose fully carried out, and where the water has been devoted to beneficial use, can be thereafter regarded as tortious.

This situation is of course emphasized, and the necessity for such continued use becomes imperative, where the bene-

ficial use of the water consists also, as here, in an extended and indispensable public use.

Much refinement and nicety of construction and distinction is indulged in where the technical rights of the Government in connection with the public lands are involved, even as to uses already vested. But from the point of view of the Government apparently no attention whatever is due to the use and enjoyment of the water rights or to the enormous investments that have been made, nor even to the extensive and vitally important public interests involved. All of these are to be swept aside if perchance some technical flaw can be found in the entry, or some formality in the way of permission can be found not to have been complied with.

This, notwithstanding the situation that the laws of Congress indicate an undoubted intention that the waters upon the public lands and within the forest reserves shall be free and open to beneficial use, and that no rules or regulations except such as are necessary in aid of this policy shall be adopted, and that this policy shall apply within as well as without the forest reserves, and also notwithstanding the continuation of the act of 1866 and the policy therein expressed in recognizing and confirming all necessary rights of way, wherever the beneficial use of water has accrued or vested under the State laws. And this technical construction is not only attempted to be applied in all such instances, but actually to the destruction of an important and permanent and indispensable public use where no other property owner under any circumstances could interrupt the same.

To hold that the United States, upon mere trivial technicalities, even if such were available, which we assert is not the case, could within any State defeat and destroy an important and necessary public use, without the power of the State to protect its people in the continuation of such necessary service and use, would be in a most important

and direct way to retard and hamper the State in the enforcement of its laws and in the protection of its citizens, as could necessarily be done as against any other property owner or in any other State where there are no public lands.

Therefore, even if the Government's technical contention could be maintained, the lands over which these uses are situated are subject to the State's power of eminent domain (even assuming that the right is not available), and, therefore, like any other owner in the same circumstances, the Government should be remitted to an action, if any action it has, to recover compensation; and in this connection we refer to the construction of the act of 1891 in accordance with principles stated on page 45 and following of the brief of William B. Bosley, herein filed, as *amicus curiæ*. As it is obviously the duty of the Secretary, under the act of 1901, to issue permits in proper cases without any impositions or burdens in addition to those imposed by the act of Congress, it would now be the duty of the Secretary, even if the Government's contentions were available, which, we assert, is not the case, to issue a proper permit, and not to destroy an essential public service.

However, we merely make these additional suggestions as indicating what would be equitably due to the defendant and to the State and its people if it could be held that the water rights were not vested, and if in addition thereto it could be held that the public and indispensable use of the people of the State was not likewise protected and vested, upon the soundest principles of law and of equity.

Obviously, we think, even if in part the contentions of the Government could be sustained in this case, no ejectment could be allowed or considered either upon principles of law or upon principles of equity, nor could the water rights be destroyed or the investments confiscated or the public use interrupted, but all that could possibly be accorded to the Government would be the right to require and receive of the defendant, not such permits or use agreements upon such conditions as might be dictated by departmental regulations

and use agreements unwarranted and wholly unauthorized by any law of Congress, but only such as would be consistent with the rights of the United States under the acts of Congress.

However, in view of our firm conviction that these rights are inherent in the States and in the people of the States under clear and well-settled principles of constitutional law, and our further conviction that in all events or any event the same are fully within, and are fully safeguarded by, laws of Congress, we perhaps owe the court something in the nature of an apology for explaining our views as to the limits of the relief that could be accorded to the United States if it could be found to be entitled to enforce any demands or claims against the defendants in connection with their occupancy and use of the rights of way necessary for the continued use of the water appropriations of the defendants, and its public service within the State of Utah. While we are assuming that the court will not be required to apply the same, we call attention to the principles decided in the case of *Mason vs. Fearson*, 9th Howard, p. 246, where the following is quoted with approval:

“Where a statute directs the doing of a thing for the sake of justice or the public good, the word ‘may’ is the same as the word ‘shall’; thus 23 Hen. VI says the sheriff *may* take bail; this is construed he *shall*, for he is compellable so to do,” etc.

And:

“Without going into more details, these cases fully sustain the doctrine that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do.”

In conclusion upon this point we submit, first, that it is undeniable from the record that the rights of the defendants were not initiated in trespass, but with the consent and acquiescence of the Government, and that in con-



nection both with the principles of law heretofore urged and also, if necessary, under the acts of Congress, the rights are fully vested in the defendants; and the further consideration previously adverted to, that in every instance where an estoppel in favor of the public is asserted, it is asserted because the initiation of the right was in trespass, and because such right has not otherwise accrued or vested, either by grant or prescription, and the original owner of the use subordinated to the public interest has not parted with his title to the property, but his property has been placed in such a position and subjected to such uses that the owner may not destroy the use and recover his property, but may proceed to recover in damages the value of the thing taken; and these wholesome principles are discussed and the authorities are cited in our opening brief.

#### **Reply to the Government's Contentions Concerning the Rights of the States.**

Obviously misunderstanding our contention, counsel for the Government, referring to the asserted right of the State to necessary and indispensable public ways for the development of its resources, including canals and other rights of way for the development of its waters, say on page 21 of their brief:

"The audacity of those who have here attempted to resuscitate a theory so ancient and so often rejected is worthy of all praise, and worthy also of a better record upon which to present it for reconsideration by this court."

Inasmuch as the contention here made has never heretofore been presented to this court except in connection with related and collateral matters, and as to such matters the decisions are uniformly in favor of the States, we hardly think counsel for the defendants and the intervening States are entitled to be credited with the "audacity" attributed to them nor have they "resuscitated" any ancient theory, and,

therefore, as attorneys for the defendants and "the inferior sovereignties" represented by the States, counsel modestly suggest that they are not entitled to the "praise" so lavishly accorded them in the Government brief.

However, very far-reaching, fundamental, and vastly important questions of government are here being presented for analysis and consideration by the highest court in the land, and we deem it a deference due to the court and the transcendent importance of the issues here presented on behalf of a nation sovereign within its granted constitutional powers and on behalf of States sovereign in their reserved powers to present the questions with due and becoming deference not only to the court, but to counsel, and however far from correct the position of the Assistant Attorney General for the United States may appear to be from our point of view, such a situation affords no relevant reason, as we understand it, for asserting that the sovereignty that he represents is "inferior" or the arguments which he makes are "audacious."

As to the assertion that the power to appropriate and use the public lands by the various public land States, including the State of Utah, has not been exercised or that there is nothing to show the exercise of such powers, the brief on behalf of the Government itself recognizes and discusses a policy and a practice existing not only after but long prior to the act of 1866, under and in connection with which the States and the people freely used and enjoyed these privileges and rights of way, first with the tacit acquiescence of the Government and later under the express recognition of this right by acts of Congress.

Not only is this true, but there never was and is not now any claim that the Government of the United States or its lands were ever injured, prejudiced or damaged or that the rights of the United States were ever impaired as proprietor of these lands by the construction of all or any such roads, canals, aqueducts, reservoirs, power-houses, power-transmission lines and the like as were requisite and necessary in the

development of the public uses and resources of the public land States and in the development of the Territories later to be admitted as States, all consistent with the declared policy under and in connection with which the United States came into the possession of these lands and became the trustee proprietor thereof.

Upon the contrary, it is all too evident that, if the policy of regulation, restriction, and control, coupled with the right of prohibition now advocated by counsel for the United States, had been in vogue, not only would the public land States, as compared with the original States, have been retarded and restricted and the interests of the States, both admitted and prospectively to be admitted, have suffered incalculable injury; but, also, the proprietary rights of the United States and its interests as a Government would have been retarded and injured in an indefinite degree.

We quote (Gov't Brief, p. 21):

"If Utah possesses a power to take property of the United States without compensation or with it, no attempt to employ it is evidenced by these records or the statutes of the State."

Upon the contrary, until within very recent years the policy of the United States was such as to absolutely concede to and recognize in the State of Utah and all other public land States the right to everything here claimed. And even as to recent matters, absolutely nothing that can fairly be interpreted as designed to restrict or retard these uses but only indicating an intention to supervise their installation can be found in any act of Congress, and the theory of a right in the United States to prohibit or place burdens of an undue nature upon the enjoyment of these essential and natural rights and uses can be found only in departmental rules and regulations.

We have asserted that a State has the right to, and, if it is to be developed, of necessity must, appropriate and beneficially use its waters, and that, therefore, by no fair con-

struction of the relations of the National Government and the States can the National Government so order or use its proprietorship of the public lands as to restrict or prohibit in an unequal way the development of the water resources of the State along with its other public resources.

In opposition to this counsel for the Government say (Gov't Brief, p. 22) :

"The State, say the proponents of this theory, has, in virtue of her sovereignty, the exclusive power to regulate the appropriation and use of the waters of all non-navigable streams within her boundaries; ergo, she must have the right to lay hold on any land deemed necessary for the fruitful exercise of the power."

Parenthetically, we suggest that, although it is assumed that the doctrine of eminent domain is not involved, because not attempted here, the situation in this case expressly negatives such assumption, for the reason that, universally we believe, it has been held that, where, as here appears, rights of way and uses have been occupied and devoted to a public use and service, in contemplation of law and equity, the public service will be protected in the view that the purposes of procedure in eminent domain have already been accomplished.

Perhaps it might be suggested that the theory, now for the first time asserted on behalf of the Government, that it owns the public lands in sovereign governmental proprietorship and that the State cannot "lay hold on" or otherwise use essential rights of way, but that the Federal Government of its own sovereign will may and could close these lands to all such uses and developments, presents a situation of constitutional interpretation much more startling than the one suggested in connection with the other alternative and a situation fruitful of infinitely greater abuse, and in the exercise of which almost inevitably conflict would arise and great harm would result, and presents a situation under

and in connection with which a State could actually be destroyed after being admitted.

While upon the other hand it would require a very resourceful imagination to imagine or assume that the construction and use over Government lands of such roads, canals, power-houses, transmission lines, telephone and telegraph lines, and other similar public ways, uses, and conveniences as inevitably must be constructed if the State is to be developed, would work any hardship upon the Government of the United States or interfere with its sovereignty. In truth, such uses would be entirely consistent with its own best interests as proprietor of these lands. And such lands could be, as was designed and intended when they were assigned to the Federal Government, disposed of to far better advantage than would be the case in the absence of such developments. And if conservation was desired, such uses would alone be consistent with true conservation.

In the opening sentence, under the heading, "Outline of the Government's Argument" (Government Brief, p. 23), the statement that "the cases depend wholly upon the intent and application of the laws of the United States" states the principal point in controversy, and assumes away without argument the contention that the United States Government cannot, through its proprietorship of the public lands and its laws or rules and regulations made in pursuance of its ownership, interfere with the legitimate development of the public uses and resources of a State.

It is assumed by counsel for the Government, on page 25 of their brief, that no facts appear or relationship is shown to exist under or in connection with which the rights of the States can be determined.

First, it should be observed that the defendant companies are the public-service agents of the State, and as such are uniformly held to be entitled to act, in connection with all such public uses and the acquisition of rights of way by eminent domain, upon the authority and with the same force and effect as the State.

They are creatures of the State, and by mandamus can be compelled by the State to perform its services and supply its inhabitants with the continued service.

It is therefore a total misconception of the situation to say that in contemplation of law, the rights of the State are not as much raised as they would be if the States were parties defendant to this action, as they should have been, and especially since the effect of the attempted enforcement of the judgment of ejectment in this case would necessitate action upon the part of the State by mandamus compelling the companies to perform their public functions, in connection with which action an inevitable and a definite conflict of State and Federal authority would arise.

The permission of the State to appropriate the waters of the State and the corresponding occupation of necessary rights of way therefor by a public-service company engaged in the development, distribution, and sale of electric power under the laws of the State may be, as stated, a delivery of such uses into the "hands of the power companies." But if that be so the "hands of the power companies" are so effectually tied by the power and authority of the State that, subject only to the limitation that the State may not take these properties for its own use or the use of others without reasonable compensation, there is no substantial difference between the control and operation of such properties by the power companies and their control and operation by the State.

While in its brief the Government returns to a discussion of the alleged claim of governmental control over the appropriation and use of waters in public-land States, we do not deem the question an open one, and submit the matter by a requotation of a part of the opinion of this court in the case of *Kansas vs. Colorado*, cited and quoted from in our opening brief, as follows, to-wit:

"But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands

within the borders, including the beds of streams and other waters.

"It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of water for the purpose of irrigation shall control. Congress cannot enforce either rule upon any State."

Furthermore, under the existing laws and acts of Congress the Government does not assert, but expressly disavows, any control over the appropriation of water. Neither does it assert any right as a proprietor of lands or otherwise to object to the appropriation of water under the State laws. On the contrary, it expressly defers thereto and recognizes such laws.

Perhaps the most fundamentally important matter stated and arising as a matter of construction is the assertion and assumption by the Assistant Attorney-General for the Government that what we here claim amounts practically to a contention that, notwithstanding power is conferred upon Congress to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States, such property can be taken from the United States and disposed of within the meaning of this provision without the consent of the United States or any act of Congress authorizing the same.

The proposition is one superficially difficult, but superficially difficult only, and perhaps we may find in this proposition the source of the discord and difference between the United States Government upon the one hand (although not here, we think, speaking by express authority of Congress) and of the defendants and the various States on the other.

Counsel for the United States assert it is wholly unreasonable, the United States having been granted the constitutional power through Congress to "dispose of" the public lands, that such lands shall be "disposed of," as is said to be herein proposed, without its consent or any act of Congress authorizing the same.



On the other hand we assert on behalf of the appellant and the States the undeniable situation that, if along with the public lands there has been conveyed to the United States Government the sovereign and exclusive power of control, then at the option of the Congress the public-land States can be deprived of their equal opportunity of development and denied equal privileges with the other States, not only so far as their growth and development is concerned, but in some instances with practical completeness destroyed.

As between such obviously opposing lines of assertion and argument, must there not be in such an important instance some clear line of differentiating the rights of the two Governments and of preserving all that was intended of the powers of Congress concerning the public lands and yet preserving the equality of right and opportunity in the various States of the Union?

And is not this solution found in the very clear, simple, and it appears to us, undeniable, distinction that the subjection of the public lands to all public rights of way and occupancies necessary to the development of the resources of the State and the enjoyment of its equality as a State and which are admittedly within the State's powers of eminent domain in all instances where the title to the land is not in the Federal Government, is not as to such uses "disposing of" the land within the meaning of the Constitution at all?

The use and enjoyment of such rights of way would not divest the Government of the fee title at all and, in the absence of some affirmative act of Congress granting the land, the right to the use and enjoyment of such rights of way would revert to the Federal Government upon the abandonment and cessation of the beneficial use.

The Government in disposing of its lands where rights of way have accrued, either under the act of 1866 or otherwise, has uniformly sold them without deduction for such rights of way, and, by such uses, unless expressly granted

by Congress for that purpose, the lands are not disposed of at all.

They are simply made subject to certain essential and necessary public uses and while so used they remain subject to the right, and when the use ceases and is abandoned, the right of way is abandoned and reverts to the Federal Government and in fact never has been taken from it except in the sense that it is subjected to the necessary beneficial use.

It is unnecessary to hold that the State or its agencies may without the consent of Congress sever and take from the United States the title to any land; but it is indispensable to the very existence of the State, to its equality of right and opportunity guaranteed to it by the very act of admitting it as a State, that it shall have and enjoy these uses and privileges, all of which each and every one of the States can have, use and enjoy without interfering with the constitutional right of the United States to "dispose of" its public lands.

And in concluding for the present upon this point, we will add further that it is all too evident, we think, upon sound principles of construction and the decisions of this court, if there could be found a definite and irreconcilable conflict so far as language is concerned, between the right of the United States to own, control and dispose of the public lands and the right of an admitted State to the development of its public uses and resources and the exercise of its powers of eminent domain, that such control over the public lands as a matter of obvious right and necessity would have to be deferred to the reserved, sovereign, and indispensable right of the State to enjoy and develop its public resources, and carry forward the purposes of its organization and existence without the possibility of the existence within it of any sovereignty that could prevent the consummation of these natural rights and the enjoyment by it and its inhabitants of equal privileges with the other

States, and the full exercise of its reserved powers of government.

The quotation from *Lindley on Mines*, 2d ed., sec. 249 (Gov't Brief, page 31), has reference to the operation of mines on the public lands, and the use and enjoyment of the same prior to patent, and the patenting of the same, and of course any rules and regulations for such private occupancy and enjoyment and of the right to acquire title by patent are necessarily subordinate to the right of the United States to dispose of these lands through acts of Congress, and not otherwise, if it chooses, to so legislate.

In the brief on behalf of the Government, the case of *Van Brocklin vs. Tennessee*, 117 U. S., 151, is cited and referred to as the authority perhaps most relied upon by the Government. Unhappily, there is an inclination to assume that any case decided in favor of the Government is an authority in favor of the Government alone in all other cases. However, it is very clear if we look at the constitutional questions involved, in a comprehensive and fair way, that such cases have exactly the reverse effect, and in this connection that a fair analysis of the case last cited will demonstrate that upon principle it is a very persuasive authority in favor of the contentions which we here make that the Government cannot assert its title to the Government lands either to prevent the States enjoying their equal opportunities of development or to restrain the development of their resources, or through or in connection with which to acquire exceptional revenues for the United States.

The principle decided in the case last cited is that the State cannot tax land owned by the United States because the power of taxation in a State is the power to destroy and the power of taxation and the power of destruction would not only defeat the operation of the revenue laws of the United States, but take its property away from it without its consent; and it is in this latter connection that the case is cited as an authority.

In this case there were some very grave and important questions to be decided and the considerations just adverted to were those that persuaded this court to hold that no State of the Union could by process of taxing the Government property defeat the operation of the laws of the United States or take from the United States its property without its consent.

Comprehensively considered, the principle thus asserted is now attempted to be reversed, and the United States Government is not only claiming that it can hold these lands, as it can, without any power in the States to tax the same, but that it can actually hold these untaxed lands in such a way as to deny to a State its reserved constitutional rights indispensable to its very existence as well as its equality as a State; and it is being further asserted that, under the laws of the United States and the rules and regulations in the record, it can actually use these lands as an instrumentality and power of taxation for the imposition of an excise tax on the products of an industry within a State, or an industry of the State itself, through and by which it can not only take away the property, but also paralyze the industry and destroy the public service of a State, all contrary to the express limitations of the very sections of the Constitution under which the United States was authorized to proceed and under which it did proceed in the case last cited.

Could any proposition be more obnoxious to reason and to justice than the proposition that, because the power of taxation in a State might deprive the United States of the means of collecting revenue and also deprive the United States without its consent of these properties, the power of taxation is denied the State, but that, by and through the very same property, holding the same as exempt from taxation for the reason stated, the United States Government could, reversing its position, wholly defeat the constitutional reserved right of the State, deny it, either in opera-

tion or in effect, the necessary functions of eminent domain and the right to develop and enjoy its public resources, and in addition thereto, acting by and through these same untaxed lands, the United States Government could impose a non-constitutional excise tax on the industries of the State as it specifically proposes to do in the record in this case, thus destroying the property of the State with the very property that it was adjudicated by this court the State might not by taxation destroy in the United States? In other words, by the property saved from destruction by constitutional principles, the Federal Government destroys the equality of the State by subversion of the same constitutional principles and imposes an unequal tax upon it, which tax is without limitation and can be used as a means of taking away from the State its property and transferring it to the United States.

The following extracts, therefore, from this case should be read so as to be made applicable, as they necessarily must be, to the position both of the Federal Government and of the States (p. 847) :

"If the States may tax one instrument, employed by the Government in the execution of its powers, they may tax any and every other instrument."

That is to say, and paraphrasing the last quotation, if the nation may tax one industry employed by the State in the execution of its powers and in the enjoyment of its public uses on and over the public lands, it may tax any and every other industry. And as further stated in the Government's brief, the power of taxation is the power of destruction, and if the position of the Government in this case is correct, any industry that is upon or that touches any part of the Government lands and that is not operating under an express grant can be destroyed by the Federal Government either by an action in ejectment such as is here under consideration or by the equally effective though more insidious process of increasing the excise tax upon

such an industry under the guise of a charge for the use of the public lands, until such industry is destroyed or taken over by the Federal Government.

Obviously, if the presumption from time to time asserted in the Government's brief and stated as a rule of constitutional construction, that a governmental power presumptively would be justly and moderately exercised, was applicable, then the power in the State to tax the property of the Government would be presumed to be justly and moderately exercised, and would not imperil the Government's property or deprive it of its revenues, but since the power in the State to tax implied the power to destroy, just so and by an equivalent principle of constitutional construction the power in the Federal Government to prohibit the use of the public lands or to impose an excise charge upon an industry for the use of the same implies and presumes the power of destruction of an essential and of many essential functions of government, and therefore cannot be recognized or allowed.

At page 73 of its brief the Government's theory is set forth as follows:

"There exists no reason why Congress should guard carefully its own acts and the acts of the Executive of the United States while leaving open the door for selfish and wasteful exploitation and other abuses under the license of State laws and customs."

With all respect we submit that it would not be possible to state a more complete misconception of constitutional government than is contained in the quoted paragraph and the connected matter referred to.

Obviously the United States under its constitutional powers of government could not question either the wisdom or effect of State laws. In more than two-thirds of the States of the Union it has no lands and could not interfere with the domestic policy of such State. Nevertheless we have here a frank statement that by an act of Congress, the ad-

ministration of which was solely committed to an executive of the Federal Government, the question of the wisdom or non-wisdom of a State policy for the development of its resources could be taken into account, and, if the official of the Federal Government did not approve of the policy or the so-called "abuse under the license of State laws and customs," such official, as the custodian of the public lands, could veto the proposed development of the State; and, of course, if he could veto an undesirable development, he could veto a desirable one, unless we assume that the State's judgment was necessarily wrong and the Federal executive's judgment was necessarily divine.

Whatever may or may not be the powers of the Federal Government over the public lands, and whatever the rights of the States may be or may not be, to necessary ways and uses for the development of their public services over the Government lands, it is as obvious as anything possibly could be, if we have any real constitution in America defining the powers of the Federal Government that it cannot possibly assert any right to determine as to whether or not a State undertaking the establishment of an essential public service for the development of its resources or industries is properly safeguarded, or whether its action is expedient, but the determination of such questions rests wholly with the State.

We again quote (Gov't Brief, page 73):

"Let it be remembered that the Federal policy of conservation *is* a Federal policy and not a State policy. It is a policy to preserve the subject-matter concerned for wise uses in the interest of all of the people in this and succeeding generations and it works through Federal laws and regulations."

If these considerations were applied to the question as to whether or not the public lands should be disposed of, or as to the title under which they should be held or used or as to any other proprietary question that the Federal Gov-



ernment could rightly consider, it would be wholly unnecessary to discuss the policy thus announced except with relation to the at least implied obligation of the Federal Government in the original compact to transfer the public lands as soon as could reasonably be done to private ownership so that they could become subject to settlement and to the taxation power of the States, and that each and all of the States of the Union should rest not only legally upon an equality, but should become and remain actually as well as theoretically equal in their opportunities of taxation and in all of the functions of Government.

But, as already stated, if this policy is a policy of Government and concerns the development of resources and the right of the State over all lands within its jurisdiction to necessary ways and easements and uses for the development of its public service, and that the conservation policy is designed to control these things as the regulations of the Department evidently contemplate, then it can be asserted with absolute confidence that the Federal Government is attempting to do in the public-land States, *as a Government*, what it cannot possibly do in the non-public land States, and what it cannot possibly claim to do under its general governmental constitutional grant of power, and that therefore the whole theory thus advanced is contrary to the granted powers of the Federal Government, contrary to the reserved powers of the State, contrary to the fundamental principle of equality of American citizenship, and contrary, we may add, to numerous clear and able decisions of this court.

In this connection counsel for the Government say:

"Minds may differ widely on the wisdom of this policy, but none can deny its existence."

To this we reply that we are not discussing the wisdom of the policy. It may be that our fathers were unwise in the adoption of the Constitution and in the granting and

limiting clauses therein contained. It may be that they were unwise, but we do not think so.

It may also be true that the Constitution of the United States should be amended, and that these functions of government should be accorded to the Federal power in all the States. We do not think so, but there might be some defensible argument made along those lines.

It may also be that the Constitution should be so amended that in the public-land States alone the United States Government could exert such constitutional powers, could veto development or provide for limitations and restrictions thereon, and could assert Federal control thereover. Or it might be provided that this should be done in the public-land States, but only as to industries developed on the public lands.

But while the propriety and necessity of such an amendment as is last indicated, which would be applicable only in the public-land States, might be argued, we think that such an argument would be possessed of little merit, and while it might receive, if suggested, some little respect, in our humble opinion it would be entitled to no respect whatsoever on the part of any one who believes in the equality of our Government and the equality of the States indispensable to the equality of citizenship.

We may add that, while such amendments would be adoptable and discussable, however indefensible, the advocacy of the idea that these policies within a State and as to domestic industries should be carried forward by the Federal Government in spite of and in defiance of the State, and in spite of and in defiance of the Constitution, are arguments that have never been made before, and we trust never again will be made in this country.

Many authorities are cited on behalf of the Government to the effect that "the control and disposition of the lands of the United States are lodged exclusively in Congress."

Several of these cases were discussed in our opening brief,

and it is here necessary only to add that one and all the cases involved the question of the transfer of title from the United States or the acquisition of title as against the United States other than by compliance with the act of Congress or as to trespasses of a private nature upon the lands of the Government.

There is neither desire nor necessity upon our part to dispute or argue this question. It is very clear that these cases are decided upon one principle, and the cases which are cited and discussed in our opening brief and extracts from which have been quoted in this brief are decided in connection with the consideration of another problem and involving an entirely different principle.

In discussion of the constitutional principle involved, the brief on behalf of the States which has been filed is so full and comprehensive as not to justify elaborate discussion here.

Attention, however, is called to the very significant provision of article VI in the Constitution that all existing engagements under the Federation are as binding upon the Federal Government as though embodied in the Constitution.

This obviously included the act of cession of the public lands and therefore and correspondingly carried in the obligations therein contained, including the obligation to admit new States over the lands thus ceded, which should be equal States in all respects whatsoever with the original thirteen States.

It is also evident, and borne out by the decisions of this court that, whether such obligation had been carried into the Constitution or not, the obligation to admit new States was an obligation that they should be admitted only as equal States, and neither in connection with the public lands nor in the act of admission could anything be inserted that would in the slightest degree impair the power, dignity or authority of a State so admitted, and, as stated by this court, such admission essentially and necessarily carried with it the right to construct roads, highways, and canals and other conveniences necessary to the development of the resources and industries of the State.

Throughout the brief it is urged that we must presume that a power of Government will be moderately and justly carried out; and, therefore, we must presume that this alleged sovereign power in the Federal Government to refuse or deny uses over the public lands will be justly and moderately used.

Such an evasive construction begs the whole question.

Of little worth would be the equal constitutional rights of a State if such right depended upon the assumption that some other sovereign had the right to prohibit or destroy, but would refrain from so doing.

We have quoted from numerous decisions of this court, especially those with relation to taxation which hold that the power of one Government over the property of another cannot include the power of taxation, because therewith is coupled the power to destroy. Here is asserted a power of destruction much more absolute, definite, arbitrary and likely to abuse than is the power of taxation, and which even includes the power of taxation or charges equivalent to taxation.

Therefore, there is no middle ground. Either the States may exercise their reserved and otherwise undoubted right to carry on and carry out in an equal way the functions of government, or else there exists a power in the United States to prevent, hamper and even to destroy the State, not only in its progress, but in its very existence.

It is not only true that the State could not develop its public uses and its resources without such essential ways and uses, but it is equally true that such uses all stand upon a parity and that a State could not, except as its procedure is acquiesced in by the United States, build a road or a railroad or other avenue of travel or communication or canals or aqueducts or other developments without such acquiescence; and, therefore, it could not operate its own Government, maintain its police or its military establishments or enforce its laws, because it could not have, use or enjoy the agencies or instrumentalities indispensable thereto.

The only way to meet or answer such an asserted and unequal power is to flatly deny the same. It is not true and it cannot be true that the Government lands have been by the constitution assigned to the Federal Government with an arbitrary power upon its part to permit or refuse to any State in connection therewith any use, convenience or enjoyment essential to the necessities of the State and to the development of its resources.

Before concluding this subject it is, we think, clearly established by the authorities which we have cited that, wherever either the nation or a State is asserting the right to exercise a power of an essentially private or proprietary nature in opposition to the exercise by the other of a power of an essentially political or governmental nature, the proprietary right or interest of either the one or the other must yield to the power of a political or governmental nature, this upon the plainest principles of necessity and justice.

That is to say, that proprietary and other private rights, whether vested in the United States or in any State, are, and of right ought to be, subject and subordinate to the sovereign or governmental rights and powers possessed respectively by the United States and the several States.

It is beyond question that the power of eminent domain, *i. e.*, the power to take private property for public use, is a power inherent in sovereignty and, therefore, belongs alike to the United States and to the several States, and may be exercised by them so far as is necessary to the full and perfect exercise of their respective powers of government. See:

*Kohl vs. United States*, 91 U. S., 367.

*United States vs. Gettysburg Elec. Ry. Co.*, 160 U. S., 668.

But, of course, neither the State or the United States can so exercise its power of eminent domain as to interfere with or prevent the full and free exercise by the other of sovereign or governmental powers vested in it by the Constitution.

*South Carolina vs. United States*, *supra*.

Necessarily there is reserved to the State, as against the United States or any property owned by the United States, the right of the State equally with the other States of the Union to enjoy and assert all of the powers of government necessary to the accomplishment of the governmental purposes of the State and for the convenience, comfort, advancement, and prosperity of the people residing within the State.

While it would have been unnecessary for the establishment of such a principle, the provision of the Constitution of the United States to the effect that in certain instances and for the governmental purposes of the United States, and with the consent of the legislature of the State, the United States might exercise exclusive jurisdiction over certain defined territories within the State accentuates and makes more clear the position and rights of the State as to all other territory over which such jurisdiction is not ceded.

This principle is recognized and confirmed in the case of *Fort Leavenworth R. R. Co. vs. Lowe*, 114 U. S., 525, which establishes the principle that the public lands the ownership of which is retained by the United States upon the admission of a new State into the Union, are not in the category of lands acquired with the consent of the legislature of a State, for any of the purposes specified in subdivision 17 of section 8 of Article I of the Constitution of the United States.

This case has already been cited and referred to, and where it holds that the general Government is not dependent upon the caprice of individuals or the will of the State legislatures in the acquisition of such lands as may be required for the full and effective exercise of its powers, it states a wholesome doctrine in connection with the powers of the general Government for its essential governmental purposes against the State, and by implication, frequently affirmed by this court, it includes the further doctrine that the State is not dependent upon the caprice of individuals

or the will of Congress in the acquisition or use of such lands as may be required for the full and effective exercise of its reserved power.

At page 126 of the Government's brief and following it is argued that there is a wide difference between admitting the sway of the State's general police power in those parts of her jurisdiction which are occupied by the public lands, and admitting her power to appropriate the lands themselves.

In this connection, referring to the appropriation of the uses and power here under consideration, and not of the lands themselves, we think it is of importance to consider that the police power of the State would be of little effect or value if the State did not have the equally unrestrained right to construct roads and other avenues of communication, and for the conveyance of information, and in connection with which only its police powers could be effectively exercised, and in some instances without these uses such police powers could not be exercised at all.

The Government concedes too much, and then claims too much. Either the State has over the Government's lands the rights and uses necessary for the enjoyment and exercise of its ordinary functions of government or it has no such rights or uses at all. By the Government it is asserted that it has no such rights or uses. Roads would necessarily be as much excluded or included as canals.

Correspondingly, the State is admitted to have police power; but, consistent with the contentions of the Government, this power could not be effectively, nor in some instances at all, carried into effect. It is asserted:

"To deny the right to take such lands while they remain Federal property is not to deny the State's power of eminent domain, but merely to limit, in favor of the superior right of the United States, the things upon which it may operate."

(Government's brief, p. 127.)



In other words, the right of eminent domain in the State is not denied, but it is forbidden, and where, as in the State of Utah, the Government of the United States owns 80 per cent of the public lands, the forbidding of such right amounts, in substantial effect, to a denial of the same *in toto*. And in all instances where there are Government lands in any State the forbidding of the exercise of such rights obviously is the express equivalent of the proportionate denial of the same.

The position of the Government in this connection is stated at page 137 of the Government's brief in the following definite language:

"The power claimed for the State would be absolutely incompatible with the power of Congress. The policy of the State might, and in all probability would, differ radically from the policy of Congress respecting the use of the land and its resources. Intolerable conflict and confusion would result. The subject-matter is not such as to admit of a divided control."

By this statement we are confronted with the final and inevitable question submitted for decision to this court, and that is as to whether or not within a State the power and control of the Federal Government over the public lands is absolute and final, and is exclusive of all State control, use, or authority.

This ultimate question we have heretofore quite sufficiently discussed, and are not now desirous of extending that discussion.

#### **The Cross-appeal of the Government.**

If the Government is right and if the appellants are wrong, it would appear that the appellants would need, if

they could obtain it, the intervention of the equitable powers of the court to save their property from destruction, while, on behalf of the Government, a decree of ejectment has been entered, and if affirmed by this court becomes final.

Under such circumstances it is rather difficult to understand the request of the Government for an accounting.

By the decree it is vested with and is to be possessed of all of appellant's properties, uses, water-rights, and the essential instrumentalities of its public service.

Evidently the Government has recovered more than it can conscientiously retain, and is desirous of obtaining the aid of a court of equity in ridding itself of an unconscionable right.

The cross-appeal indicates that the Government itself is of the opinion that it is entitled to an adjustment of rights and interests, and not to a decree of ejectment.

If this be so, we are brought to the inquiry, would the court be bound by departmental rules and excise charges, or would it be the duty of the court to consider the law of Congress, determine the situation, and adjudge what, if anything, the Federal Government would be entitled to?

Assuredly the court would not direct an accounting and a judgment consistent with certain arbitrarily fixed charges upon the production of electric power within a state.

Unless these charges are such as can be imposed by the Federal Government, and also unless they are authorized and fixed by law of Congress, a court could not by any possibility or reasonable consideration of legal principles proceed in accordance therewith, or even consider the same.

It may therefore be submitted that even if the court should adjudge that the Government was entitled to relief, that relief could not consist in a judgment of ejectment, but it could only consist in a determination of the court in accordance with the rules of law and the constitutional right of the Government and of the State and of the de-

endants as to what conditions of occupancy and use could  
be by the Government imposed on the defendant.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1916.

UTAH POWER & LIGHT COMPANY, AP-  
pellant,  
v.  
UNITED STATES. } No. 202.

UNITED STATES, APPELLANT,  
v.  
UTAH POWER & LIGHT COMPANY. } No. 203.

THE BEAVER RIVER POWER COMPANY,  
appellant,  
v.  
UNITED STATES. } No. 204.

UNITED STATES, APPELLANT,  
v.  
THE BEAVER RIVER POWER COMPANY. } No. 205.

LUCIEN L. NUNN AND THE BEAVER  
River Power Company, appellants,  
v.  
UNITED STATES. } No. 206.

UNITED STATES, APPELLANT,  
v.  
LUCIEN L. NUNN AND THE BEAVER  
River Power Company. } No. 207.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF UTAH.

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**BRIEF FOR THE UNITED STATES.**

**INTRODUCTORY.**

These cases, which have been set down for hearing  
at one time because of their close similarity, may be



conveniently dealt with in one brief. The three defendants are engaged in the business of generating electricity from water power and disposing of the current to anyone within reach of their transmission lines who wishes to buy it. They do not themselves make use of the current they produce, nor do they dispose of it for specific uses only. Their ultimate business is the creation and sale of the electricity; their customers are at liberty to use it, and do use it, for any purpose they select.

The plants whereby these operations are conducted consist of reservoirs, diversion dams, flumes, pipe lines, power houses equipped with generators, etc.; stables and other subsidiary buildings, transmission lines, telephone lines; and in one case a tramway 2,350 feet long. Excluding two of the four power houses and including only portions of the transmission lines, all of these structures are located on lands of the United States forming part of the national forests in Utah. The records show that, roughly, 69,000 feet, or over 13 miles, of flume and pipe and many miles of transmission and telephone lines, besides the tramway, power houses, and numerous other buildings, are thus constructed and in use upon the Government land, without, as the Government contends, any warrant in the laws of the United States.

The object of these suits is to test the legality of this occupancy and user in each case and, if legality be found wanting, to require the defendants to conform with the legislation of Congress or, at their option, remove from the Government lands.

In the view of the Government, fully sustained by the judgments and opinions of the Circuit Court of Appeals in recent cases (*United States v. Utah Power & Light Company*, 209 Fed. 554; *Utah Power & Light Company v. United States*, 230 Fed. 328; *Utah Light & Traction Company v. United States*, ib. 343), the only act of Congress under which the lands of the United States, whether reserved or unreserved, may be occupied and used for commercial power enterprises, is the act of February 15, 1901, hereinafter discussed, which requires that a permit or license be first obtained from the executive branch of the Government. In these cases it is conceded that no such permission has been sought or granted. The defendants are at liberty to seek the protection of that law if they see fit to do so, thus following the example set by many other similar enterprises. They, however, are contending for views which, if conceded, would soon operate to place every valuable power site on the public lands and reservations of the West in the ownership of the power corporations, and thus destroy at one blow an important element in the plan of conservation. This is the sensational feature of the cases, if such they may be said to possess. The idea that the defendants have been abused or misled by the Government is, of course, a mere fiction, introduced because of its rhetorical possibilities. It will be evident to the court, we think, that with these defendants, the Government, far from acting harshly, has exercised exceeding patience, allowing them, as the bills aver, the amplest opportunity to comply with the law before these suits were instituted.

## STATEMENT OF THE FACTS.

The cases were all disposed of by the District Court on motions to strike the answers and for final decrees. These, on the authority of the decision of the Circuit Court of Appeals in *United States v. Utah Power & Light Co.*, 209 Fed. 554, were decided in favor of the Government, in so far as the questions of title were concerned, and final decrees were thereupon entered, adjudging the United States to be the owner of the lands in dispute and that the defendants be enjoined from further maintaining and operating the works situate thereon. Upon the giving of security the injunctions were suspended pending these appeals. The cross appeals were based upon the failure of the court to grant pecuniary relief as prayed in the bills. We will consider them later. The facts, as contained in the pleadings, are quite simple. The difficulty here lies in disentangling the really relevant matter from the confusion of argument, conclusion, assertion, and self-contradiction which congests the answers. In the performance of this task we assume that doubts and uncertainties may be resolved against the pleader, and that where an answer denies a thing in the mode of legal conclusion and subsequently admits it as a matter of fact the admission will prevail.

Viewed generally, the relevant facts, as we conceive them, are, first, that, save for the claims of the defendants here in issue, all the lands in controversy are lands of the United States which for some years have been incorporated in national forests; second, that the use to which the defendants have been put-

ting these lands, and out of which their water and other rights, if any they possess, have arisen, is the commercial power use; third, that not only waterways and reservoirs, but other utilities, such as power houses, transmission lines, etc., are necessarily involved in this use, and share in the questioned occupation of the Government land; fourth, that this use and any rights which may cling to it, began in the several cases, at different times, which are material to consider with reference to the dates of Federal legislation (especially February 15, 1901), and the dates when the lands were added to the forest reservations; and, lastly, that none of the defendants has ever applied to the Secretary of the Interior, or the Secretary of Agriculture (who presides over the forest reservations), for a permission or license of any character.

There are assertions of a general custom in Utah to appropriate Federal lands for commercial power plants, but these we disregard as both irrelevant and self-evidently untrue. The same may be said of allegations designed as a support to the claim of estoppel, as that the Government stood by and allowed the works to be constructed, or encouraged the enterprise, or even, as one of the answers solemnly assures us, entered into *an agreement* with the defendant and the State of Utah that the thing should be done. Charges also are made that the present regulations governing the administration of the act of 1901 and the forest reserve laws in respect of power plants are unreasonable and void. These also, even if they were

well grounded, would be of no present interest, while the defendants refuse to legalize their intrusions by applying for permits. When they do this they will be in position to question the legality of the stipulations and regulations sought to be imposed upon them, but plainly not before.

In pursuance of these general observations we come now to a separate statement concerning the peculiar facts in each case.

**Facts in the case of Utah Power and Light Company,  
No. 202.**

The plant consists of a power house and transmission line, a wood-stave conduit pipe over 10,000 feet long, an iron pipe nearly 6,000 feet long, a small reservoir, over 4,000 feet of steel pressure pipe, 2,350 feet of tramway, and a telephone line traversing two quarter sections; also a small two-story frame house, two frame tents, and a woodshed (R. 2, 16). The power house and transmission line are on private land (R. 16), but all the other elements mentioned occupy lands of the United States which became a part of the Wasatch National Forest on July 1, 1910, through a proclamation of the President (R. 2; 36 Stat. 2721).

On September 15, 1905, one Lucien L. Nunn, acting in the interest of defendant's predecessor, the Telluride Power Company, made application to the State engineer for a right to use 15 cubic feet per second of water from "the Utah Lake system" for power purposes. This application was received at the State engineer's office September 20, 1905, but

was not approved by the State engineer until March 14, 1907, and then "on condition that actual construction work should be begun within six months and should be completed within one and one-half years from the date of the approval." The work was begun within the six months and completed within the one and one-half years "from said date" (meaning March 14, 1907), and due proof of its completion was filed with the State engineer. (R. 27.) On November 5, 1910, that official issued to Mr. Nunn a certificate of water appropriation dated as of September 20, 1905, for 15 cubic feet of water to be diverted from Battle Creek and Grove Creek and used for power purposes. Nunn afterwards assigned his rights to the Telluride Power Company, the defendant's predecessor. Although the bill alleges (R. 1) and the answer also (R. 25) that the works were completed and put in operation by December 1, 1906, it would seem from the other statements of the answer just recited that construction work was not begun until after March 14, 1907. At all events it is plain that the earliest date assignable as the date when the rights claimed by the defendant had their inception is September 15, 1905, when the water right was applied for, and that the works were actually constructed and in operation, if not in December, 1906, at least within a year and a half from March 14, 1907. All of these times antedated the incorporation of the *locus in quo* into the national forest, but all are subsequent to the act of February 15, 1901,

which plainly extends its requirements to public lands as well as lands reserved, and therefore applies in this case, if our contention of its effect upon prior legislation be sound.

The answer further avers that by virtue of this appropriation and use of water the defendant as successor in interest of the appropriator is vested, under the laws of Utah, with the right to use the waters as they have been diverted and used at its works. (R. 28.) No facts are alleged which tend to show that the State has undertaken to grant the rights of way in controversy. The answer, to be sure, sets up an act of the legislature dated April 5, 1896 (Laws 1896, p. 316, sec. 1; R. 19), declaring the use and application of "the unappropriated waters of the natural streams and watercourses of the State to the generation of electrical force or energy to be employed in industrial pursuits" a public use in behalf of which the right of eminent domain may be exercised; and another, dated March 11, 1897 (Laws 1897, p. 223, sec. 17; R. 20), declaring that any person or corporation shall have the right of way upon "public, private, and corporate lands," for constructing, maintaining, repairing, and using all necessary works for storing and conveying water "for irrigation, or for any necessary public use \* \* \* upon payment of just compensation therefor," and further declaring that "such right of way may be acquired in the manner provided by law for the taking of private property for public use." But it is not averred that any step was ever taken under the



condemnation laws of Utah to secure the rights of way in question, or that any money was ever paid or tendered to the United States in consideration therefor.

With respect to the telephone line, tramway, and buildings referred to in the bill, the answer (R. 27) avers that they are essential parts of the plant, used in the maintenance, operation, and repair of the reservoir and conduit.

**Facts in the case of Beaver River Power Company,  
No. 204.**

The answer in this case, like the other answers, sets up the laws and customs of Utah as a source of right independent of the Federal laws, and the supposed loose construction and general disregard of the latter as a reason why the United States should be estopped to enforce them in this case. It goes further, in asserting that the defendant's predecessor was invited to construct its works on the land in controversy under an understanding and agreement with the United States, participated in, in some way, by the State of Utah, and even asserts that these lands, which were all reserved for forest purposes before the defendant undertook to do anything, were for a time released from reservation to permit the defendant to go ahead (R. 18). The agreement is alleged to have been that a right should be allowed under the act of February 1, 1905 (*infra*), which does not apply to such enterprises (R. 20).

The defendant was organized under the laws of Colorado, June 10, 1907, was first admitted to do

business in Utah November, 1907, and has been using the lands in question since April 1, 1908, in the generation and transmission of power for general commercial disposition (R. 1, 12). As described in the bill (R. 2), the works consist of a power house and some subsidiary buildings, a reservoir and various pipe lines or conduits, telephone lines and transmission lines, all of which are upon land of the Fillmore National Forest except a part of the transmission lines. These lands were reserved for forest purposes by a preliminary withdrawal (*United States v. Morrison*, 240 U. S. 192) August 20, 1902, and afterwards by proclamations of January 24, 1906 (34 Stat. 3189), and April 25, 1907 (35 Stat. 2128), were incorporated in the Beaver National Forest, the name of which was afterwards changed to Fillmore National Forest. The exact locations of the power houses, other buildings, pipe lines or conduits, and transmission line are given in the bill according to public survey descriptions (R. 2), and are shown upon a plat attached as an exhibit (R. 6). It thus appears that they are all situate in township 29 S., R. 5 W., and township 29 S., R. 6 W., Salt Lake meridian. The reservoir site is located on the W/2 of section 2 and E/2 of section 3 in township 30 S., R. 5 W. (folio 3), not on the plat. The answer admits that these locations are correctly stated in the bill (R. 12, 16).

As no construction work appears to have been done prior to the withdrawal of 1902, the answer seeks to avoid the effect of that reservation by setting up two

departmental orders of restoration (not proclamations, as erroneously stated; R. 16), which were made on April 18, 1904, and October 5, 1905, respectively. It avers that the first of these was an order vacating the previous withdrawal as to sections 3 to 10, inclusive, and 15 to 36, inclusive, of T. 29 S., Range *six* W. (R. 16), and that the second (the order of October 5, 1905), "vacated" and "restored to settlement" all the lands in townships 29 and 30 south of range *five* west, and those in sections 1 and 2 and 11 to 14, inclusive, of T. 29 S., Range *six* W. So that, the answer avers, from April 18, 1904, to April 25, 1907 (the date of the second proclamation), a part of the lands in question was vacant public domain, and from October 5, 1905, to January 24, 1906 (the date of the first proclamation), the rest of the land in question was, in like manner, unreserved and open.

Reference to the orders of withdrawal and restoration themselves, which we print in the appendix, will show that the one dated April 18, 1904, while it purported to revoke the original order of withdrawal, merely undertook to restore the lands affected "to settlement and entry," whereas the order of withdrawal had reserved them "from settlement, entry, sale, or other disposal under the public-land laws." Furthermore, the order of October 5, 1905, as appears by the answer itself (R. 17), restored the lands upon which defendant operated "to settlement only."

The lands affected by the order of April 18, 1904, embrace the buildings, part of the main conduit, and all of the transmission line now on the forest lands. Those affected by the order of October 5, 1905, embrace the reservoir and the remaining conduits. The telephone lines extend from the buildings practically parallel with the transmission line and with the pipe line to the defendant's dam on Beaver River (R. 3).

The answer avers that defendant owns certain lands in T. 29 S., R. 4 W., and T. 29 S., R. 5 W. (not mentioned in the bill or involved in the litigation), on which is a lake called Puffer Lake, with the right under the local law to impound and release from the lake and appropriate and use all the water flowing thereto (R. 13); and that it is engaged in storing water in the lake and releasing it into tributaries of Beaver River, and thence diverting it into the main conduit mentioned in the bill and returning it to the river. Then follows an allegation (R. 13) that the defendant "and its predecessors in interest have been so doing, and so appropriating, reservoiring, withholding, and beneficially using the water so stored in said Puffer Lake since on or prior to the year 1895, and the right to the use and appropriation of said waters has been vested in the defendant and its predecessors in interest, and those operating in conjunction with defendant, since on or prior to said date."

It is further alleged (R. 14) that "the predecessors in interest" of the defendant, on July 5, 1895, made an appropriation and beneficial use of the waters of the South Fork of Beaver River by placing a dam

across it and making a reservoir, occupying a portion of the SE/4 of section 3, and a portion of the SW/4 of section 2, T. 30 S., R. 5 W., which corresponds with the situs of the reservoir described in the bill. The answer proceeds as follows:

\* \* \* and said water was appropriated, diverted, and beneficially used and reser-voired and withheld in said creek and in said reservoir ever since the date last aforesaid, and the said right to the appropriation and beneficial use of said water has been vested and accrued under and in accordance with the laws of the State of Utah ever since the date last aforesaid, and has been beneficially used by the defendant, and its predecessors in interest, ever since said date, and is *now* diverted and used as an essential part of the water appropriation and hydroelectric system of the defendant herein, and the said property, and rights of property, and water and water rights herein referred to and described are and constitute an essential, important, and indispensable element and part of the hydroelectric system referred to and described in plaintiff's complaint.

All this is taken to mean no more than that in 1895 two water appropriations were initiated—one at Puffer Lake on land not here involved, the other on land which is involved—by persons whose works the defendant afterwards appropriated (there is no sufficient averment of privity), or whose rights it somehow acquired, and that the water is *now* being used in the operation of the plant complained of.

These allegations do not show the prior use, or where or how the application was made. They cast no light at all upon the time when the defendant, or anyone else, began to occupy or claim the particular land in controversy except for the reservoir mentioned in the bill. This diagnosis is confirmed as we proceed deeper into the answer.

On October 5, 1905, "the predecessors in interest" of defendant, "being upon said lands and *engaged in the work of appropriating* said waters," appropriated and gave notice of appropriation of the said waters *now* used in connection with the hydroelectric works, and ever since then the defendant "and its predecessors in interest" have complied with the laws of the State, etc., "and beneficially used said waters." Such allegations do not show the time, extent, or nature of the use; they do not indicate when the hydroelectric works were projected or begun (R. 18), or when the land of the United States now in question was first appropriated, or how.

The next paragraph (R. 18) inconsistently states that *prior to June 15, 1905*, the defendant and its predecessors in interest *had made appropriation of* and given notice of appropriation of the waters for "such" beneficial uses and had expended large sums of money in necessary work "connected with the appropriation and use of said water," the nature of the alleged work not being stated. It was thereupon "arranged and agreed between the predecessors in interest of the defendant and the plaintiff herein, its officers and representatives," that the plaintiff—that

is, the United States—would, through the President, create the Beaver National Forest, covering and including the lands now occupied and used by the defendants, and it being also understood and agreed that the establishment of the forest, “under the claims of the representatives of the plaintiff, would seriously interfere with, if it did not *prevent, the appropriation* and beneficial use of said waters and the generation and distribution of said electric power, except and unless the rights and future procedure of the defendant and its predecessors were agreed upon,” etc., the plaintiff (United States) and the State of Utah and the defendant’s predecessors, “all being desirous that the said waters *should be appropriated* and beneficially used, and said hydroelectric development *should be established,*” agreed that the forest should be created and a right of way thereafter granted under the act of February 1, 1905 (R. 18, 19).

After the proclamation of January 24, 1906, “the predecessors in interest of the defendant, being in and upon said forest reservation, continued and proceeded with the construction” of dams and other works “*for the appropriation and beneficial use* of said water, and also including the construction of the necessary power houses,” etc., and thereafter, during the years 1906, 1907, and part of the year 1908, defendant “and its predecessors in interest” completed the works, including the power houses and transmission lines, “for the appropriation and beneficial use of said water and the production and generation of electric power thereby,” etc. (R. 19).



It is evident from all of these allegations that nothing was done toward the construction of the works or the use of any of the lands now in controversy until long after the general permit law was approved, February 15, 1901, and even after the land had been incorporated into the national forest.

**Facts in the case of Lucien L. Nunn, No. 206.**

The lands involved in this case are all situate in township 26 south, range 5 west, and township 27 south, range 5 west, and are shown with the improvements on the exhibit attached to the bill (R. 2, 6), the correctness of which the answer concedes (R. 8). The bill alleges, and, saving the legal effect, we understand that the answer intends to admit, that these lands were included in the preliminary withdrawal of August 20, 1902 (R., 2), and put in the Beaver (now Fillmore) National Forest by the proclamations of January 24, 1906, and April 25, 1907 (R. 2, 8, 13). The answer (R. 12) sets up the same orders of restoration as are set up in the answer in cause No. 204 and claims, as that answer does, that because of such orders the lands in townships 29 and 30 south of range 6 were open and unreserved for certain periods. Those, however, are the townships involved in the Beaver River Company's case, and, as they do not include any of the lands involved in this one, we assume this part of the answer is due to oversight (R. 12-13). Reference to the orders (see Appendix) will show that the two townships here affected were included in the order of August 20, 1902.

Neither was included in the restoration order of April 18, 1904, but both were for a time restored "to *settlement only*" by the order of October 5, 1905. The defendant Nunn (the Beaver River Power Company disclaimed, R. 24) has been operating the plant since July 28, 1911 (R. 2, 7). It is a double plant, possessing two power houses, the upper of which is on a patented mill site (R. 8). Over 24,000 feet of water conduits, one power house, dwellings, stables, transmission lines, and telephone lines, as described in the bill and its exhibit, are on the Government land.

The answer avers (R. 8) that the lands occupied by the first 4,500 feet of the upper flume "are covered by valid mining claims, located, occupied, and possessed under and in accordance with the laws of the United States, which said claims were located in and have been maintained since the year 1902," from which vague allegation *non constat* that the defendant has any interest in the claims, or that they may not have been located after the land was reserved. The time of appropriating water and constructing the plants is described in the answer (R. 9 15) as during the years 1900, 1901, and 1902. The original use was for mining and supplying a mining town with current for light, heat, etc. (R. 9, 15). The times and acts are so stated that it is impossible to tell what, if anything, was done in the way of construction or use before the withdrawal of 1902, or before the act of 1901. The earliest date sug-

gested is 1900. At that time the act of January 21, 1895 (28 Stat. 635), authorizing permits for mining purposes, and the act of May 14, 1896 (29 Stat. 120), authorizing permits for generating and distributing electric power, were in force and applicable to unreserved land. As was expressly held by the Circuit Court of Appeals in *United States v. Utah Power & Light Co.*, 209 Fed. 554, compliance with the act of 1896 was necessary in order to secure a lawful status. It was not complied with.

The lower power house, together with the rights of way appurtenant thereto for conduits, transmission lines, and telephone lines, is situated upon the lands of the United States (R. 8). In the nature of the case, as alleged by defendant (R. 9), he can not make beneficial use of the waters claimed for the benefit of this plant without utilizing this power house and the Government land upon which it is situated. As we shall show, there is no theory of the act of July 26, 1866 (sec. 2339, R. S.), or of the act of March 3, 1891, which can derive from them any authority to construct or maintain a power house or transmission line on the public domain. This power house, and the transmission lines, therefore, until authorized by special permit under the act of May 14, 1896, or act of February 15, 1901, or the forest regulations, are maintained in trespass. The utilization of the ditches and water rights pertaining to this plant, as shown by the bill of complaint (R. 2, 6), is, as admitted by the defendant (R. 9), dependent upon this trespass.

**ANALYSIS OF THE DEFENDANTS' CONTENTIONS.**

The propositions which we deem necessary to answer may be summarized as follows:

First. It is claimed that under the laws of the United States the defendants, by diverting water and applying it to a beneficial use—namely, the development of electricity for commercial disposition—have acquired indefeasible right (easement or base fee) to all the ground occupied by their works. This claim absolutely must rest upon the act of July 26, 1866 (R. S. 2339), for there is no other act of Congress which can be construed as authorizing the private appropriation of public land for commercial power enterprises without an express permit from the Executive. Although that act in terms is confined to land required for canals and reservoirs, the defendants would extend it by implication to include land for power houses and other buildings, transmission lines, telephone lines, and in one case even a tramway used in connection with the business. Although, according to settled principles of construction, it relates only to the vacant public land, the defendants, wherever necessary in these cases, would have it apply to forest reservations as well.

Aside from these questions touching its scope, the defendants insist that the act of 1866 has remained unaffected by later legislation. They conceive the acts of May 14, 1896, and February 15, 1901, were intended, not as argued by the Government and decided by the Court of Appeals, to declare the conditions upon which these power operations may be

permitted on the public lands and reservations, but to enlarge the wide latitude of unsupervised private appropriation which was permitted by the act of 1866, by providing a method for segregating desirable land in advance of the occupation and construction work required to initiate rights under that early act.

Upon the soundness of this last-mentioned contention the cases, in our judgment, would be found to depend, if the use for reservoirs and canals, or equivalent flumes and pipe lines, were the only use involved in them, and if the right to such restricted use could be said to have vested prior to the reservation of the land. But, obviously, if, as the Government insists, the act of 1866 was not intended to allow the appropriation of land for power houses and transmission lines, enterprises which can not be conducted without using Government land in those ways are built upon trespass; no lawful, and hence no "beneficial," use has been made of the reservoirs, flumes, and pipes, and hence the act of 1866, even if untouched by later acts, has here had no occasion to operate.

Second. The other branch of the defensive argument attributes to the State a power to appropriate, and to authorize others to appropriate, the land of the United States for the purposes of internal improvement. It is to be regretted that there is not more uniformity among the opposing briefs, and more consistency in individual briefs, respecting the basis of this important assumption. In one of the larger briefs, purporting to have been filed by

the Attorneys General of Utah and other States, the theory is advanced in its extreme form. The State, in virtue of her sovereign equality and independence, may take any land of the United States, reserved or unreserved, within her borders, so it be not devoted to Federal uses strictly governmental in character, and she may authorize corporations and individuals to do the like, for executing her policies of internal development. This theory rises superior to the mere detail of Federal permission; nor is it even dependent on the idea that the power of the State over water (assumed to be exclusive) must needs import full power to take land of the United States to convey water and to use water. The audacity of those who have here attempted to resuscitate a theory so ancient and so often rejected is worthy of all praise, and worthy also of a better record upon which to present it for reconsideration by this court. Unfortunately there is nothing here to show that the power claimed has so far been exercised by the State of Utah in any of these cases. Utah has a condemnation law, but, like other condemnation laws, it does not apply to the property of the United States; and in all cases to which it does apply it requires that compensation be paid the owner. If Utah possesses a power to take property of the United States *without compensation* or with it, no attempt to employ it is evidenced by these records or the statutes of the State.

Another form of the State rights theory deduces the power to take the Federal land from the State

control over water. The State, say the proponents of this theory, has, in virtue of her sovereignty, the exclusive power to regulate the appropriation and use of the waters of all nonnavigable streams within her boundaries; *ergo*, she *must* have the right to lay hold on any land deemed necessary for the fruitful exercise of the power. This takes care of reservoirs, canals, flumes, and pipe lines; *item*, power-house sites, transmission lines, and all the other means of using the water. How a control over water (if it existed) could be spread so liberally over the land is not made clear.

A third and less ambitious form of the State-rights theory asserts that the Federal Government, through the act of 1866, the desert-land law of 1877, and other statutes, including the reclamation act of 1902, has somehow relinquished to the State all interest and authority that it possessed in and concerning the waters on its lands. The theory rests upon an untenable construction of the acts referred to. It is, furthermore, a theory irrelevant to the present cases, unless the court should feel at liberty to infer from a State control over water a power to seize Federal lands, and unless it felt free to overlook the circumstances that the State, if it has such a power, has so far abstained from its exercise.

Numerous other contentions are made in the briefs opposed, such as that the Government is estopped from holding the defendants to an observance of the law; that the Executive regulations which the defendants would be asked to observe if they complied



with the law are unlawful and void; that the Government has no constitutional power to maintain the forest reservations and supervise and control any manufacturing and other operations that may come about therein, particularly if conducted by public-service corporations amenable to the police of the State, etc.

Some of the briefs, too, seem disposed to claim rights under the irrigation right-of-way law of March 3, 1891, as amended in 1898, and under other right-of-way or permit laws which plainly have no application and have not been complied with. Some of the questions thus raised will receive further notice in the body of our argument; others will dispose of themselves.

#### OUTLINE OF THE GOVERNMENT'S ARGUMENT.

First. The cases depend wholly upon the intent and application of the laws of the United States. The act of July 26, 1866, allowed the public lands to be occupied by reservoirs and ditches and canals for the storage and conduct of water to be used in "mining, agricultural, manufacturing, or other purposes," in accordance with local laws, customs, or decisions of courts. Giving this act a liberal construction, it permits pipe lines and flumes to be substituted for canals, and, extending it still further, it may be deemed to cover commercial power production among the "other purposes," though such a use was not in contemplation when the act was passed. It can not, however, be so stretched as to include lands

which have been reserved as national forest lands; and, consequently, so much of the land here in controversy as was not occupied and used before inclusion in a forest stands clearly beyond the operation of the act. It does not mention and can not be stretched to include the use of land for power stations, transmission lines, telephone lines, and tramways. The act did not purport to grant all the land that might be deemed necessary or convenient in the use of water. It granted the land necessary for the storage of water and its transportation to the place of use, and no more. The lands constituting the place of use, like power sites, and the ways for the transportation of the products of the use, such as the lands upon which transmission lines are built, or the roads which a mill owner might need, to haul and deliver his bullion or flour, were to be obtained under other laws. It follows that, irrespective of whether it has been superseded by later legislation, and irrespective of the forest reservations, this law can afford no ground of defense in these cases in respect of any feature of the plants in question where either the power house or transmission line is on land of the Government, for no right to maintain the flumes and pipe lines could emerge without a beneficial use, and no such use was made or could be made without a continuing trespass.

But furthermore, and especially, the act of 1866, in so far as it related to electric power enterprises, was superseded by the act of May 14, 1896, as was expressly held by the Circuit Court of Appeals in

*United States v. Utah Power & Light Co.*, 209 Fed. 554, and even more obviously by the general permit act of February 15, 1901. Those acts antedate the occupation and uses here in question. Both provide for the granting, by the Executive branch, of permission to use in accordance with rules and regulations. Neither the language nor the history of these acts lends any support to the defendants' argument that they were intended to enlarge the scope of the act of 1866 by permitting lands to be reserved in aid of subsequent occupation and use under that act. The language employed, the legislative history, and the departmental construction all go to prove not only that the permission relates to the use itself but also that these statutes—the act of 1896 while it remained in force and the act of 1901 since its approval—must be regarded as the only source of such permission.

Second. In respect of the State authority but little need be said. When the State essays to exercise the prerogative of appropriating the public and reserved lands of the United States, or of delivering them into the hands of power companies without asking Federal consent or tendering compensation, then may there be occasion for this court to consider again, as it has considered so many times already, whether the lands and the other property of the United States are truly at the disposal of Congress, as the Constitution says, or whether they are the subject of divided and conflicting authority; and whether the United States is supreme in all of its constitutional contacts, or in some of them is dominated by the control of an

inferior sovereignty. We assume that the disposal of the public lands lies exclusively with Congress; that not under the name of eminent domain, or police power, or any other name or conception which the ingenuity of counsel may invent, can this power be wrested away from Congress; that the subordination of the United States to the State in any respect is, constitutionally speaking, inconceivable; and that these several propositions rest on doctrine which has been solidly and immutably laid down by this court in many cases.

**ERRORS ASSIGNED BY THE UNITED STATES.**

There are two assignments in each cross appeal, viz:

1. Error in refusing to require the defendant to account for the value of the use of the lands in controversy, to be measured by the duration of the enjoyment thereof by the defendant, the net power capacity of the plant, and the scale of charges adopted in the regulations of the Secretary of Agriculture governing similar cases during the period of use.

2. Error in refusing an accounting for the reasonable value of the use of the lands.

These assignments will be discussed at the close of the brief.

## ARGUMENT.

### PART FIRST.

Showing that the defendants can have acquired no rights under the laws of the United States.

#### I.

*The act of July 26, 1866 (14 Stat. 251), as supplemented by the act of July 9, 1870 (16 Stat. 217), R. S., §§ 2339 and 2340.*

[For the text of these sections of the revision see Appendix, p. i.]

(1) This was a general land law enacted for the disposition of mineral lands, water rights, and rights of way for ditches, canals, and highways upon the public domain.

The local customs, decisions, and laws were adopted in respect of mining land, water rights, and rights of way alike, as supplementary regulations merely. Their force depended wholly on the act itself. Congress was left free to change the policy, repeal or amend the act, and thus withdraw the public domain and the water upon it from the influence of these subordinate regulations.

The occasion and history of this legislation, with specific reference to water rights and waterways, are sufficiently shown by the opinions in—

*Jennison v. Kirk*, 98 U. S. 453.

*Atchison v. Peterson*, 20 Wall. 507.

*Basey v. Gallagher*, Id. 670.

*Broder v. Water Co.*, 101 U. S. 274.

See, also, 1 *Wiel on Water Rights* (3d ed.), secs. 66 *et seq.*, 92 *et seq.*

1 *Kinney on Irrigation and Water Rights* (2d ed.), secs. 595 *et seq.*, 611 *et seq.*, 636 *et seq.*

It was the direct outgrowth of the extraordinary conditions which had arisen in California and Nevada and in certain of the western Territories because of the discovery of gold and other minerals and the absence of any general mining law. Mineral lands had been appropriated by thousands of persons; mining and its adjuvant, milling, were in process on an enormous scale; waters, diverted by means of ditches, canals, and flumes, were being employed in the mining industry and for agricultural and other uses, contributing to the comfort and support of the miners, the settlers, and the local communities. All this was upon the public domain and in technical trespass upon the property rights of the United States, but regulated by orderly and firmly established codes of rules, derived from the customs of the local communities, the acts of local legislatures, and the decisions of local courts, all subject, of course, to the underlying rights and dormant powers of the United States as the owner of all the property affected. It was to fit this situation, already legalized to some extent by the acquiescence of Congress, and provide for the protection of the beneficial uses concerned that the legislation was enacted.

The relation of the two acts to water rights and waterways was precisely the same as their relation to the mineral lands. The first act, though styled merely "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," was in reality the first general mining law of the United States. Its first section declared that "the mineral lands of the public domain" should be

open to exploration and occupation by citizens, etc., subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, *so far as the same may not be in conflict with the laws of the United States.*

Sections 2 to 4 provided for the locating, entering, and patenting of lode claims occupied and improved "according to the local custom or rules of miners" in the mining district, "so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners" (sec. 2), authorizing the surveyor general to vary the form from rectangular "to suit the circumstances of the country and the local rules, laws, and customs of miners," with a proviso that no location should exceed a certain length for each locator (sec. 4).

Section 5 provided:

That as a further condition of sale, *in the absence of necessary legislation by Congress*, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Section 8:

That the right of way for the construction of highways over public lands, *not reserved for public uses*, is hereby granted.

In section 9 we find substantially and almost in words R. S. section 2339.



Section 10 allowed settlers on nonmineral lands which had been excluded from survey as mineral to acquire them under the preemption and homestead laws.

The act of 1870 amended the act of 1866 by adding six new sections numbered 12 to 17, inclusive. Section 12 extended the law with certain modifications to placer claims. Section 13 provided that where claims had been held and worked "for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated," the right to patent should be deemed established. Sections 14 to 16 dealt with land office procedure, fees, and surveys. Finally, section 17, which has been modified into R. S. section 2340, *supra*, declared:

That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all *public lands* affected by this act; and all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may *have been acquired under* or recognized by the ninth section of the act of which this act is amendatory.

The sections 5, 8, and 9 here referred to are, the section allowing local legislatures, in the absence of legislation by Congress, to provide rules "for working mines involving easements, drainage, and other

necessary means to their complete development," the section granting rights of way over public lands for highways, and the section concerning water rights and ditches. R. S. 2339.

We need not elaborate this analysis nor resort to extensive citations in support of a proposition so obvious and well understood as that the local rules, whether found in miners' customs, court decisions, or legislative acts, were adopted merely to supplement the particular provisions and fundamental conditions of the act, in order to fit it to local conditions, including local preferences, and avoid unnecessary complexity and volume in the act itself. This plan of adopting local laws or rules as the laws and rules of Congress is familiar enough. It is seen in the legislation defining crimes on reservations under exclusive jurisdiction of the General Government; in the conformity provisions governing the Federal courts in common-law cases; in various laws for the taking of affidavits, etc. Illustrations might be greatly multiplied.

The local laws, customs, etc., in respect of mining claims, retain their function under the mining law as it is to-day. They depend, of course, upon the express permission of Congress therein contained.

State statutes in reference to mining rights upon the public domain must, therefore, be construed in subordination to the laws of Congress, as they are more in the nature of regulations under these laws than independent legislation.

1 *Lindley on Mines* (2d ed.), sec. 249.

Quoted with approval in *Butte City Water Co. v. Baker*, 196 U. S. 125.

Their constitutionality, challenged in the case last cited, was upheld upon the ground that a delegation of authority to adopt "minor and subordinate regulations" concerning the disposition of the public domain is not a delegation of strictly legislative power. See also *Clason v. Matko*, 223 U. S. 646, 654.

It is somewhat astonishing to find this *Butte City case* and the *Broder case* (101 U. S. 274) cited in opposing briefs as authority for the idea that the act of 1866 recognized an independent title or power in the States. They hold the exact reverse.

As was said in *Jennison v. Kirk*, *supra*, page 456, referring to R. S. section 2339:

The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands.

Again, page 460:

Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the State and moulded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by

the local customs, laws, and decisions, would be thereby destroyed, unless secured by the act, and it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners.

And in *United States v. Utah Power & Light Co.*, 209 Fed. 554, 560, the court said:

It will thus be seen that this legislation constituted no grant of specific rights by the Congress of the United States. The efficacy of local customs, laws, and decisions to supersede the disposing power of Congress is denied. The purpose was to confirm title to possessions acquired under forms and regulations, sanctioned by the State and moulded by its courts, with the acquiescence and tacit encouragement of the Government. The act "was rather a voluntary recognition of a preexisting right of possession, constituting a valid claim to its continued use, than the establishment of a new one." (*Broder v. Water Co.*, 101 U. S. 274, 25 L. Ed. 790; *Atchison v. Peterson*, 20 Wall. 507-512, 22 L. Ed. 214.) In view of the express power conferred upon Congress by the Constitution, and reserved to it by the organic law of the State of Utah, it can not be successfully urged that such legislation committed the Government to a policy that should be irrevocable.

(2) The act of 1866 granted no rights for power houses, transmission lines, telephone lines, or tramways, but only for ditches, canals, and reservoirs.

The face of the act itself settles this proposition. Only canals, ditches, and reservoirs are mentioned in the section relied on by defendants. The act, as we have seen, also provided for highways. Mineral land and mill sites could be obtained under it, and nonmineral land under other laws of that day. Access to the public lands and means of acquiring them for "mining, agricultural, manufacturing, or other purposes" were thus provided independently of the waterways. The place of use, be it mine, mill site, farm, or home, must be legitimately occupied under the mining or agricultural land law before there could be a legitimate use or a lawful occasion for the diversion of water or the construction of a ditch. To infer from the general license to divert water and construct ditches the right to appropriate whatever public land might be required to use them in accordance with the plans of the appropriator would be wholly indefensible.

In *Utah Light & Traction Co. v. United States*, 230 Fed. 343, the circuit court of appeals expressly held that sections 2339 and 2340 extend only to ditches, canals, and reservoirs, and, by analogy, to dams, flumes, pipes, and tunnels for the transport of water, but by no possibility to power houses, cottages, and transmission lines. The case involved structures placed upon public lands before the passage of the act of May 14, 1896, *infra*. The court also (errone-

ously, we think) decided that rights for reservoirs and conduits might at that date be acquired under the sections referred to by occupancy and construction, and irrespective of beneficial use—that is, even though the use through power houses on public lands was tortious. Upon stipulation of parties the mandate has been stayed to await decision of these cases.

In *Cleary v. Skiffich*, 28 Colo. 362, it was claimed by one of the parties that a right in land needed for the construction and operation of a mill could be acquired as an appurtenance through a diversion of water and construction of a ditch for operating the mill. In support of this proposition the above-mentioned sections of the Revised Statutes were relied on. In disposing of this proposition adversely the court remarked (p. 373):

The right might become appurtenant to that in connection with which it was beneficially used, but the latter could not be appurtenant to such right. It might as well be argued that because a vested right to the use of water had been acquired for irrigation purposes, that there attached to such right as an appurtenance, land upon which to apply the water, as to say, as in this instance, there passed with the water right land in connection with which such water was utilized.

(3) The act relates only to the public lands and never had any operation in forest reservations.

It is a familiar principle that an act like this, disposing of interests in the public domain, will not be construed to affect lands which have been or may be reserved from the operations of the general land laws. *Wilcox v. Jackson*, 13 Pet. 498; *Newhall v. Sanger*, 92 U. S. 761; *Scott v. Carew*, 196 U. S. 100. There are many other decisions of this court to this point.

A necessary result of setting aside a forest reservation, pursuant to section 24 of the act of March 3, 1891 (26 Stat. 1095), is to withdraw the area designated from all general laws not made specifically applicable, such being, indeed, the initial purpose of reserving the land. The act of 1891 did not even declare that the mining laws should constitute an exception; therefore further legislation was necessary to extend them over the reservations. Congress first, by the act of February 20, 1896 (29 Stat. 11), threw open certain particular reservations to prospecting and mining, and later, by the forest reserve act of June 4, 1897 (30 Stat. 11, 34-36), provided generally for the extension of the mining laws to all these reservations, subject, however, to the regulations; and made certain provisions concerning the use of water which will be discussed *infra* (p. 52).

The irrigation right of way provisions in the act of 1891 (see *infra*) apply to reservations by express mention; the general railway right of way act of March 3, 1875 (18 Stat. 482), did not so apply until expressly extended by the act of March 3, 1899 (30



Stat. 1214); and, as will be seen from the numerous other acts involved in this discussion, the invariable practice of Congress, whenever it intends that right of way acts shall operate in national park or forest, is to say so *in totidem verbis*.

In *Kern River Company*, 38 L. D. 302, 309, the department held R. S. sec. 2339 inapplicable to forest reservations.

(4) It results from the premises that, even if the act of 1866 had remained unaffected by subsequent acts of Congress, it would afford no justification for intrusion on reserved land, or for the appropriation of power sites and ways for tramroads, or transmission and telephone lines on any land of the United States, reserved or public.

## II.

*In so far as it relates to the disposition of water rights, the act of 1866 remains in force; in so far as it permitted rights of way to be acquired under State rules for commercial power uses, the act has been superseded by subsequent acts, culminating in the act of February 15, 1901.*

(1) References to the acts of Congress in which the original policy respecting water rights has been reiterated, with modifications. Incidentally, it will be noted that these laws lend no support to the theory that the Federal proprietary rights respecting surplus water on the public domain have been abdicated, but, in fact, contradict it. This question, however, like the broader inquiry concerning the State's inherent power over water, which we mention below, is deemed wholly immaterial to these cases.

Besides the forest reserve legislation of 1897, hereinafter discussed, there are a number of statutes in

which the policy of Congress to permit the appropriation of water and leave it largely in the control of the local regulations has been reiterated. As may be noted in passing, these laws do not bear out the assertion that the Federal interest in water has been transferred to the State. Individually and collectively they indicate that Congress, generally speaking, still prefers, as it did in 1866, to leave the matter of water appropriation on the public domain to local regulations. Although, as a whole, the adherence to this policy respecting water accents by contrast the curtailment, if not abandonment, of the policy of permitting local rules to define rights of way also, it is to be noticed that in these later declarations concerning water there is evident not only a consciousness of the power to deal with that subject without State intervention but in some instances an actual exertion of the power itself. We can not take these declarations as intending either to grant an exclusive power to the States or to recognize such a power as already existent. They merely adhere to the general principle of the act of 1866 as one of convenience. They favor the laws of the Territories quite as much as those of the States, and in some instances they give rules independent of either.

On this subject see the discussion and citations in 2 *Kinney on Irrigation and Water Rights* (2d ed.), section 637.

The desert land law of March 3, 1877 (19 Stat. 377), quoted from in the brief of Utah (p. 66), de-

clares that all surplus (that is, unappropriated) water of the nonnavigable lakes and streams on the public lands "shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." This has been cited as an irrevocable "dedication" to the States; but a glance at the whole proviso will convince that it will hardly bear such construction. The proviso does not refer to the States or the local laws and customs. Congress itself undertakes to lay down the essential conditions of a water right: it "shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation," under the desert land law; and the free right of appropriation is made coextensive with the public lands in the States and Territories named. The case of *Hough v. Porter*, 51 Oreg. 318, appears not to have been fully understood by the writers of some of the opposing briefs. The learned and exhaustive opinion of Mr. Justice King fully sustains, and, indeed, depends throughout, upon the proposition that the United States, as the owner of the public domain, is quite competent to dispose of the waters thereon together with the land, or to dispose of each separately, or to dispose of one and retain the other. The question examined was whether various owners who had obtained patents for riparian lands from the United States *after* the desert land law became effective had thus acquired full riparian rights in

the waters, no reservation in that regard being expressed in the patents. The court holds that such rights (except for domestic and other purposes not named in the act) were withheld from disposition with the land by reason of this declaration of the desert law, which the opinion in some places treats as amounting to a reservation by the Government and in others as a dedication by the Government to "the public." To hold that there was actually a dedication, and that the Government had thus at one stroke parted with all its interest in the unappropriated waters, was quite unnecessary to the decision; for, obviously, if the intent of the declaration was, as it may well have been (*Williams v. Altnow*, 51 Oreg. 275; *United States v. Dam Co.*, 174 U. S. 690; *Gutierrez v. Land Co.*, 188 U. S. 545), to set the waters apart from the land, for acquisition by appropriation only, subsequent land patents would not operate to give riparian rights, whatever might be their terms as drafted in the department.

See 1 *Kinney*, pp. 1091, 1095.

The reference to *Hough v. Porter* in *Boquillas Cattle Co. v. Curtis*, 213 U. S. 339, 344, is as follows:

The opinion that we have expressed makes it unnecessary to decide whether lands in the arid regions patented after the act of March 3, 1877, c. 107, 19 Stat. 377, are not accepted subject to the rule that priority of appropriation gives priority of right by virtue of that act construed with Rev. Stat., § 2339. The Supreme Court of Oregon has rendered a decision to that effect on plausible grounds.

The clause from the timber and stone act of June 3, 1878 (20 Stat. 89; Utah brief, p. 94), protects the water rights and rights of way "conferred by" the act of 1866, and declares that all patents shall be subject to such rights, "*acquired under the provisions of said act,*" which is very far from admitting that any of the rights mentioned was the issue of a State law, or that the power to grant them has been dedicated to the States.

The act of March 3, 1891 (26 Stat. 1095, sec. 18), granting rights of way for irrigation purposes, declares that the privilege granted shall not be construed to interfere "with the control of water for irrigation and other purposes under authority of the respective States or *Territories.*" This means the authority to control the appropriation of water on the public lands conferred by the act of 1866. The Territories are put on the same plane with the States.

An act approved February 26, 1897 (29 Stat. 599; Utah brief, p. 105), opened to use reservoir sites which had been reserved by the General Government, with the proviso that *charges* for the water should be "subject to the control and regulation of the respective States *and Territories,*" etc.

Section 8 of the reclamation act of June 17, 1902 (32 Stat. 388; Utah brief, p. 172), declares that the act shall not affect or interfere with "the laws of any State or *Territory,* relating to the control, appropriation, use, or distribution of water used *in irrigation,*" and directs the secretary in carrying out its pro-

visions "to proceed in conformity with such laws." The same section, however, provides:

That the right to the use of water *acquired under the provisions of this act* shall be *appurtenant to the land irrigated*, and beneficial use shall be the basis, the measure, and the limit of the right.

Here again, we see that the State and Territorial laws are rated on a par and that Congress itself undertakes to create water rights and define them. A water right acquired by appropriation and beneficial use in irrigation is not usually appurtenant to the land irrigated. *I Wiel on Water Rights* (3d ed.), § 550.

In concluding this topic we observe that the proposition that Congress has somehow divested the Federal Government of its property interest in and resultant control over surplus waters on the public lands of the West, though immensely important, if true, has nothing to do with any of these cases. We shall recur to this matter later, when discussing briefly the idea that the States possess inherently the power to control the appropriation and use of water on public lands of the General Government.

**(2) Review of the acts of Congress, later than the act of 1866, which govern right-of-way privileges on public and reserved lands.**

We will discuss these acts in chronological order. They demonstrate the progressive policy of Congress to deal with the right-of-way privileges by direct legislation and through executive supervision. The

act of 1866, *quoad* commercial power uses, was repealed by the acts of May 14, 1896, and February 15, 1901.

**The irrigation right-of-way provisions in the act of March 3, 1891 (26 Stat. 1095, secs. 18 to 21).**

[For text see Appendix, p. i.]

Save as it may influence the construction of other acts in an argumentative way, this act has no bearing on the present case.

(a) *The right of way is granted for irrigation purposes only.*

This is demonstrated by the face of the act and by repeated and consistent constructions by the Land Department. See:

*H. H. Sinclair*, 18 L. D. 573, holding that the application could not be allowed when the object was to generate electricity to be used in municipal lighting.

*South Platte Canal and Reservoir Co.*, 20 L. D. 154, where, although the main purpose was irrigation, the application was rejected, because there was also the purpose to supply water, in emergencies, to the city of Denver.

*Chaffee County Ditch and Canal Co.*, 21 L. D. 63, July 18, 1895, denying the right where the main purpose of irrigation was coupled with a purpose to float logs.

*William Marr*, 25 L. D. 344, October 22, 1897, holding the purpose must be irrigation only, and that the acts of January 21, 1895, and May 14, 1896, have no bearing on the question.



*Opinion of Assistant Attorney General Van Devanter*, 28 L. D. 474, 476, where this construction was fully upheld.

The same view was accepted as correct by Congress when it passed the act of May 11, 1898, as will be seen when we come to speak of that act (*post*, page 54). It is confirmed by the construction of that act by the department.

*Opinion*, last cited, 28 L. D. 474.

*Kern River Co.*, 38 L. D. 302.

(b) *Section 21 of the act expressly provides that rights of way therein granted shall only be occupied for canals or ditches, and then only so far as may be necessary for the construction, maintenance, or care of such canals or ditches.*

Necessarily, power houses, transmission lines, and tramways are excluded. *Whitmore v. Pleasant Valley Coal Co.*, 27 Utah, 284.

(c) *Under this act no right can be obtained in a forest reservation without previous application to and approval by the department having control.*

This approval is required by the proviso in section 18, as well as by the law and regulations respecting the use and occupation of the forests. *United States v. Grimaud*, 220 U. S. 506. See:

*Instructions of March 21, 1892, 14 L. D. 336, 343; February 20, 1894, 18 L. D. 168; July 8, 1898, 27 L. D. 200; June 27, 1900, 30 L. D. 325; June 26, 1902, 31 L. D. 503; September 28, 1905, 34 L. D. 212; June 6, 1908, 36 L. D. 567.*

*James W. McKnight*, August 13, 1891, 13 L. D. 165.

*Florida Mesa Ditch Co.*, February 27, 1892, 14 L. D. 265.

*H. V. Gruening*, March 21, 1895, 20 L. D. 253.

*La Plata Irr. Ditch Co.*, October 31, 1895, 21 L. D. 355.

*Surface Creek D. & R. Co.*, June 16, 1896, 22 L. D. 709.

*Rio Verde Canal Co.*, August 25, 1898, 27 L. D. 421.

(d) *This act, in connection with the acts of October 2, 1888 (25 Stat. 526), and August 30, 1890 (26 Stat. 391), providing for the Federal selection and reservation of reservoir sites, may be said to mark the beginning of a Federal policy which was bound to supplant the laissez faire policy of the act of 1866.*

According to the view expressed by the department (*Lincoln County Co. v. Big Sandy Co.*, 32 L. D. 463, 465), the act of 1891 worked no interference with the act of 1866 respecting irrigation rights. Each granted an easement or base fee. The act of 1891 allowed the rights of way to be obtained either by filing and securing the approval of maps, etc., followed by actual construction, or, substantially, at least, by actual construction alone <sup>1</sup> (*case of Hamilton Pope*, 28 L. D. 402, 403; *De Weese v. Henry Irr. Co.*, 39 L. D. 27),

<sup>1</sup> The idea put forth in some of the other briefs that the right gained by actual construction comes through the State laws or the act of 1866, as supplemented and extended by this act, has no support. The theory that rights might be gained by construction was founded on the language of the act of 1891 itself. Because of its similarity to the general railway right-of-way law of March 3, 1875, and the manner in which the latter had been construed in *Dakota, etc., R. Co. v. Downey*, 8 L. D. 115, and *Jamestown, etc., R. Co. v. Jones*, 177 U. S. 125, the department held that, as against third parties, rights might be acquired by actual construction before any map had received executive approval. See also *United States v. Lee*, 15 N. M. 382.

though, probably, as against the Government (as distinguished from rival claimants), the right could not be regarded as vested without the Executive approval for which the act provides. See *Minneapolis, etc., Ry. Co. v. Doughty*, 208 U. S. 251, 257; *United States v. Minidoka Co.*, 190 Fed. 491 (reversed on another ground, 235 U. S. 211.) The act of 1891 gave a definite width of 50 feet on each side of the marginal limits of the water, which was doubtless more than could be claimed under the act of 1866.

While it is thus apparent that there was no occasion to adjudge a repeal of the earlier law, it is equally apparent that the act of 1891 marks a distinct alteration in the policy of Congress. The grant, of specified dimensions, is made directly, without the intervention of the State agency. Federal supervision is provided, as well as Federal record.

**The act of January 21, 1895 (28 Stat. 635).**

[For text see Appendix, p. ii.]

This authorized the Secretary of the Interior, under general regulations to be fixed by him, to "*permit the use*" of rights of way for tramroads, canals, or reservoirs by any citizen or association of citizens "*engaged in the business of mining or quarrying or of cutting timber or manufacturing lumber.*"

It applies only to the public lands, expressly excluding the parks and forest, Indian, and military reservations.

It has no application to any of the rights claimed in these cases, and this for the double reason that the

defendants have never applied for or obtained any permit and that the rights claimed are for uses which the act does not recognize.

Its significance is in the purpose manifested to adopt the plan of granting *permits* or licenses, under executive regulation, instead of easements without regulation, and to substitute direct dealing between the Federal Government and the grantee for the loose, indirect process permitted by the act of 1866.

**The act of May 14, 1896 (29 Stat. 120).**

[For text see Appendix, p. iii.]

(a) *It repealed the act of 1866 in respect of electric power uses.*

This act, though in its title purporting to amend the act of 1891, in its body amends the act of 1895 by adding a new section.

The new section authorizes the Secretary, under general regulations to be fixed by him, "*to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations, \* \* \* by any citizen or association of citizens for the purposes of generating, manufacturing, or distributing electric power.*"

The specific question whether this section repealed the act of 1866, *quoad* the purposes enumerated, is directly involved in these cases only in so far as rights are claimed to have accrued prior to the act of February 15, 1901, the manifest repealing force of which we consider below. The question was, however,

directly presented in another suit against one of these defendants, and in that case the judges of the Circuit Court of Appeals were unanimously of opinion that the question must be answered in the affirmative. *United States v. Utah Power and Light Co.*, 209 Fed. 554.

This conclusion was fully justified by the terms of the act, its legislative history, and executive construction. A permission to use, to be obtained from an executive officer, and to be subject to his regulations, is a wholly different thing from a right in fee, obtainable without applying for permission from anybody and enjoyable without regulation. The provisions for permission from the Secretary and for rules and regulations were not idle and vain. They were serious provisions which Congress must have intended for serious results. The court in that case observed:

As has been stated, the Government's position is that the act of May 14, 1896, and the rules and regulations promulgated thereunder, by making specific and comprehensive provision respecting a subject, to wit, the generation, manufacture, and distribution of electric power, conceived to be embraced within the terms of the prior and more general act, withdraws that subject from the operation of the former act to the extent to which it is governed by such special provision and is pro tanto a substitute for and repeal of the general statute which formerly governed. It is a well-settled principle of construction that

specific terms covering a given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling.

\* \* \* \* \*

The Government does not contend that section 2339 of the Revised Statutes has been wholly repealed but merely that the subsequent act of 1896 has withdrawn from the operation of that section the subject of generating, manufacturing, or distributing electric power, the manner of acquiring rights of way over the public lands for those purposes, and the nature and extent of such rights. We think this contention is sound. The terms of the original statute are broad enough to include the specific form of manufacture now under consideration. *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601-632, 15 Sup. Ct. 912, 39 L. Ed. 1108. Control over the disposition of the public lands and all rights and interests therein, remain unimpaired in the Congress. Evidently that body perceived that the time had come when changed conditions and the complex interests and relations of our national life demanded that, with respect to this particular form of industry, the application of the former act, as worded and construed, should be modified and restricted; therefore it enacted the subsequent legislation.

To treat this statute as a mere addendum to the act of 1866, as a means of facilitating the application of that act not only to the public land but also to the forest reservations where it never applied, is to

ignore the meaning of its words and close one's eyes to the historic development of the conservation doctrine in the policy of Congress.

The legislative history, given in Utah's brief (p. 85) and in this one, where we discuss the act of 1901, is in itself a complete refutation of this illusory theory.

(b) *Answer to the contention that the act of 1896 does not apply to canals and ditches.*

In the opinion of Mr. Assistant Attorney General Van Devanter of June 6, 1899, 28 L. D. 474, the question involved was whether the Secretary of the Interior had authority to grant permission for reservoirs and ditches within forest or other reservations for the purpose of *mining*. The opinion contains a general review of the right-of-way statutes and, in discussing the possibilities of the act of 1895, which relates to mining, quarrying, and cutting timber, it was said (p. 475):

This act [1895] was amended by that of May 14, 1896 (29 Stat. 120), but this amendment does not refer to permits for canals and ditches.

Literally this is true; canals and ditches are not named in words. If anything more was intended, the remark was evidently an inadvertence. Both before and after the rendition of the opinion permits for reservoirs, canals, and ditches under the act of 1896 were approved in decisions of the Land Department. In *H. W. O' Melveny*, 24 L. D. 560 (June 23, 1897), it was held that an application for rights of way under the acts of 1891 and 1896 could not be



granted; the application must rest on either the one or the other. A permit for the use of rights of way for canals and ditches under the act of 1896 was allowed. In *Chicala Water Co. v. Lytle Creek Light & Power Co.*, 26 L. D. 520 (April 15, 1898), an application for permission to use a right of way for a canal and pipe lines, for electric-power operations, was also approved under the act of 1896. In *New Bear Valley Irr. Co. v. Roberts*, 30 L. D. 382 (December 24, 1900), another application for conduits, canals, and pipe lines under the act of 1896 was allowed.

Other instances in which the Land Department approved applications for rights of way for water conduits under the act of 1896 are found in 31 L. D. 360 (June 20, 1902), 32 L. D. 144 (May 29, 1903), and 32 L. D. 178 (June 19, 1903).

This consistent view of the Land Department finds full justification in the legislative history (see, *infra*, in connection with the act of 1901), which proves conclusively that the act was intended to control the waterway privileges as well as all others related to the business of generating electric power.

Nor is it unreasonable to suppose, especially with the letter of the act, the legislative history and the departmental construction all concurring, that Congress meant exactly what it said. Twenty-five feet is ample for most canals and pipe lines. It is not by any means clear that such additional space as would be actually required for grades, cuts, and supports would not be added by implication. Nor is the plain meaning of a statute to be distorted to suit the

plans of the beneficiary and satisfy his heart's desire. Congress doubtless was giving as much as it thought necessary. Compare Attorney General McReynold's opinion in 30 Op. 263, quoted below, page 88:

**The Forest Reserve legislation of June 4, 1897 (30 Stat. 11).**

So much of this legislation as seems material is printed in the Appendix (p. iii).

Importance is attached in some of the opposing briefs to the declaration that—

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Speaking of this provision, in his opinion of June 6, 1899, 28 L. D. 474, 477, Assistant Attorney General Van Devanter observes:

It does not grant a right of way through these reservations, nor does it confer upon the Secretary of the Interior any new or additional authority to permit the use of a right of way through them or within their boundaries.

It will be observed that while "prospecting, locating, and developing of the mineral resources" are allowed, the right to construct ditches is not given. The act permits the waters on the reservations to be used, under the laws of the State or the United States, but only for "domestic, mining, milling, or

irrigation purposes," and subject to the rules and regulations for which the act provides. It is argued that, because the water may be used, all the means for using it, including not only ways for canals and pipe lines, but even power sites and ways for transmission lines and telephone lines and tramways must be deemed included. Here again we encounter the same absurdity mentioned above, but in an even more aggravated form. The right to take water must include the right to take land for a ditch, and the right to have a ditch necessarily carries with it as a mere incident the right to use it, and therein to occupy and enjoy whatever land may be employed in the uses the promotor may have in mind. By this progressive reasoning a claimant of a right to divert water might soon find himself in the possession and enjoyment of an entire forest reservation. Obviously, the uses of water intended to be allowed are such as may be practiced consistently with the objects of the reservation and by ways authorized by Congress. This provision concerning the use is merely a modified reiteration of the consistent policy of Congress, to which we have already given some attention, to leave the matter of defining and controlling the uses of water as far as possible to the local laws.

We do not think it necessary to reply at length to the contention that the act of 1897 was intended to start the act of 1866, with all the local laws and customs concerning water rights and ditches, at work in the forest reservations. The language employed

is wholly inapt, and the results claimed would serve to defeat the main purpose of the act which is relied on to produce them. There were persons "residing within the boundaries of such reservations," owning "property or homes" there. Others were permitted to enter for "proper and lawful purposes," including mining and milling, if they complied with the rules and regulations. (*United States v. Grimaud*, 220 U. S. 506.) The situation called for the use of water, and the object of the provision under discussion was to recognize the legitimacy of the use, for the purposes specified, if consistent with the laws of the State or other laws of the United States. As for rights of way, the act itself does not undertake to give any, except as it allows the Secretary generally to regulate the use of the reserved land, and except as it specifically declares that such wagon roads and other improvements may be constructed under the rules and regulations, as may be necessary to reach the homes and utilize the property of actual settlers.

**The act of May 11, 1898 (30 Stat. 404).**

[For text see Appendix, p. x.]

*(a) Inapplicability of the first section.*

The first section amended the act of January 21, 1895, *supra*, by authorizing the Secretary of the Interior to issue *permits for the use* of rights of way on the *public lands only*, for "tramways, canals, or reservoirs \* \* \* for the purposes of furnishing water for domestic, public, and other beneficial uses." The permit may extend to the ground occupied by

the water of canals or reservoirs and 50 feet beyond the marginal limits thereof, and to 50 feet on each side of the center line of a tramroad.

Inasmuch as the act does not include reserved lands and the defendants have never applied for or obtained a permit under it, it must be inapplicable in the present case. We need not, therefore, concern ourselves over the question whether "other beneficial uses" was intended to include commercial power operations. If it was, the effect was merely to enlarge somewhat the privileges obtainable under the act of 1896 upon public land.

See *Utah Power & Light Co. v. United States*, 230 Fed., at page 331.

*(b) The second section merely permits rights of way acquired under the act of 1891 for irrigation to be used in a subsidiary or incidental way for the other purposes specified.*

This section provides:

That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions [of secs. 18 to 21] of the act of 1891 \* \* \* may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.

In construing this law the department has uniformly and correctly held that the new uses are conditioned on the existence of the purpose required

by the act of 1891. The act of 1891 is the granting act, and under it no grant may be obtained except for the purpose of irrigation. The act of 1898 allows such grants *when* so obtained to be used for the additional purposes which it specifies.

See:

*Opinion of Assistant Attorney General Van Devanter*, June 6, 1899, 28 L. D. 474;

*Town of Delta*, 32 L. D. 461;

*Inyo Consol. Water Co.*, 37 L. D. 78;

*Kern River Co.*, 38 L. D. 302;

*Instructions of President*, October 20, 1910, 39 L. D. 309;

*California-Nevada Power Co.*, 40 L. D. 380;

*Utah Power & Light Co. v. United States*, 230 Fed. 332.

The opinion of Assistant Attorney General Van Devanter, *supra*, after referring to the decisions we have cited under the act of 1891, proceeds to say (p. 476):

The act of May 11, 1898, *supra*, purports to be an amendment of the act of 1895, and section 1 relates only to the public lands not within the limits of any reservation. Section 2 is in effect amendatory of the act of 1891 and relates to all lands coming within the purview of that act, which embraced both public lands and reservations of the United States. It provides that the rights of way granted under the act of 1891 may be used for purposes of a public nature and for water transportation, domestic purposes, and for the development

of power. This section does not purport to make any new grant, but simply permits the rights of way granted by the act of 1891 to be used for other purposes than that of irrigation. No new class of grantees is described in this section, and to determine who may be entitled to a right of way it is necessary to turn to the act of 1891. There the grantees are described as "any canal or ditch company formed for the purpose of irrigation." If it had been intended to enlarge the class of grantees, some apt language similar to that of the first section would have been used in this second section of the act of 1898. The controlling idea was still, as in the act of 1891, irrigation.

So far as these acts are concerned the Secretary of the Interior has no authority to grant the right to establish a reservoir or construct a ditch within the limits of the Yosemite Park or any forest reserve in California for mining or for domestic purposes.

October 20, 1910, the Secretary instructed the Commissioner as follows:

In connection with the application of the Ramona Power & Irrigation Co., for a right of way over lands in the State of California under the provisions of the act of March 3, 1891, the attention of the President was directed to the case in order to obtain an expression of his views as to the policy which should be adopted in cases of applications for rights of way under the act of 1891, *supra*, as amended by the act of May 11, 1898 (30 Stat. 404), where the primary and principal use of the right of way



is sought for the purpose of irrigation, but where there is involved a development of electrical power or energy for the purpose of pumping water to lands from streams, reservoirs, or wells. The President has expressed himself in the case submitted as of the opinion that the application should be granted upon the express condition that the right of way is sought and approved for the main purpose of irrigation, and that the power uses are subsidiary to and mainly for the purpose of serving and carrying out irrigation.

Accordingly the application of the Ramona Co. has been approved by letter of even date in the following form:

Approved, subject to all valid existing rights and upon the express condition that the right of way hereby approved is to be used for the main purpose of irrigation; that any electrical power or energy developed thereunder is to be primarily used in and for the purpose for which the right of way is granted, viz, irrigation, and any abandonment or violation of such use or neglect to comply with the provisions of the law will work a forfeiture which will be enforced by appropriate proceedings.

39 L. D. 309.

In the *Utah Power & Light Company's* case, the Court of Appeals says (230 Fed. 333):

The decisions of the land department referred to cover the period from 1894 to 1910. They consecutively antedate the act of 1898 and extend through a period contemporaneous with its enactment and the administration of

its provisions. As such they are entitled to respectful consideration by the courts [citing authorities]; but, further than this, as a matter of independent judgment, we concur fully in the views expressed by the officials of the Interior Department. The first section of the act of 1898 has no application in any event, and the second section does not enlarge the class of grantees entitled to the benefits of that act, but merely specifies the additional purposes for which the rights of way acquired under that act by eligible parties may be used. Therefore this act of May 11, 1898, neither enlarges the act of 1891 in such manner as to supersede the act of 1896 nor reinstates sections 2339 and 2340 of the Revised Statutes in so far as those sections have been affected by the act of 1896.

(c) *The legislative history confirms this view of the second section.*

A bill (H. R. 9607) was introduced in the Fifty-fourth Congress and referred to the Interior Department for criticism. The Commissioner of the General Land Office and the Secretary wrote letters to the committee, in which, for reasons stated, changes were recommended. These were adopted by the committee, and the bill as thus amended was reported and passed. (See House Report 2790, 54th Cong., 2d sess., printed in the Appendix of this brief, p. v; 29 Cong. Rec., pp. 1714, 2427; *Id.*, pp. 2458, 2459.) It also passed the Senate. (*Id.*, pp. 2715, 2716.) It was signed as an enrolled bill in the House on

the 3d of March (*Id.*, p. 2728), but seems to have died for lack of Executive approval.

The same bill was reintroduced in the 55th Congress as H. R. 1595. It was again referred to the Interior Department, and the Commissioner and the Secretary wrote letters referring to and reaffirming the previous recommendations. They are contained in House Report 279, 55th Congress, second session, which we print in the Appendix, page viii. There is also a Senate report, No. 600, of that session, which sheds no additional light. The two House reports, as well as the proceedings in Congress, indicate quite plainly that the principal objects were to provide pure water for municipal and domestic purposes.

Mr. De Vries, in explaining the bill to the House, used the following language:

Under the law, as it stands at the present time, all rights of way for the construction of reservoirs, canals, and ditches through the public domain are limited to those the purposes of which are the furnishing of water for irrigation, mining, and reservoir purposes. It does not permit its use for private or domestic purposes, and, if it is desired to supply a city from a reservoir or canal across the public domain, such permission is not authorized by the law as it stands at present. It is, therefore, sought to amend the law by this bill, extending and enlarging the existing privileges, and allowing a license over the public domain for these purposes.

31 Cong. Rec. p. 1435.

For further proceedings, see same volume, pages 2407, 4490.

As appears by the first House report (2790), the bill originally permitted the rights of way acquired under the act of 1891 to be used for all purposes specified in the first section of the law as enacted. The Commissioner and the Secretary both objected to this, the latter saying that he did not believe it would be for the public benefit to have the rights of way granted under the act of 1891 subject to the additional uses, and that it would tend to confuse the right-of-way acts then in existence. The former, after pointing out that the act of 1891 gave irrevocable easements, while the act of 1895 allowed only permits, made the following criticism and suggestions:

By allowing the easement granted under the act of 1891 to be used for "other beneficial uses," it would permit the right of way to be used for mining, quarrying, or lumbering, and would open the grant of the easement to all sorts of private uses, under the well-settled rulings of the courts of the Western States in construing the words "beneficial use" in the local laws. This would be contrary to the spirit of the acts of 1891 and 1895, as understood by this office, in distinguishing between public and private uses, and appears, therefore, very objectionable.

I am of the opinion that if it were allowable to use the right of way for domestic or public purposes or for certain other purposes, which will not diminish the amount of water available for irrigation, as subsidiary to the main

purpose of irrigation, the act of 1891 would be much more satisfactory in its operations and the intention of the act as conferring a general benefit would be fully subserved. I would, therefore, recommend that all after the word "uses" in line 16 be omitted, and the following added.

The words added by the Commissioner were adopted by the committee and were enacted as the second section of the act.

**The general permit act of February 15, 1901 (31 Stat. 790), by necessary implication, repealed and superseded the act of 1866, in so far as the same applied to rights of way of the kinds involved in this litigation.**

[For text see Appendix, page x.]

Prior to this act, as has been shown, the material acts were Revised Statutes, 2339 and 2340, granting rights of way over the public lands for "mining, agricultural, manufacturing, or other purposes," which, however, did not apply to national forests; the act of March 3, 1891, granting rights of way over both the public lands and forest reservations for "the purposes of irrigation"; the act of January 21, 1895, authorizing the Executive to permit the use of ways, over the public land only, for "mining or quarrying or of cutting timber and manufacturing lumber;" the act of May 14, 1896, authorizing such permits to be granted for ways over public lands and forest reservations for "the purposes of generating, manufacturing, or distributing electric power"; and the act of May 11, 1898, which allowed the Execu-

tive to permit the use of ways over public land for "furnishing water for domestic, public, and other beneficial uses," and further provided that rights of way, when obtained under the act of March 3, 1891, for irrigation, might be employed in certain other uses subsidiary to that main purpose.

(a) *History of the act of 1901, showing that it was intended as a complete revision of all prior laws applicable to rights of way for the purposes which it specifies.*

When the act of May 14, 1896, was under consideration in the House, Mr. McRAE, chairman of the Committee on Public Lands, after other remarks not here material, introduced the following colloquy:

Mr. Speaker, if my colleague on the committee will allow me, I will state that this bill does not grant or authorize the grant of any land. It only authorizes the department to issue permits for the use of these lands for the purposes stated. It does not apply to the National Yellowstone Park, nor to military reservations, but only to lands reserved for forestry purposes.

Mr. McMILLIN. Does the bill provide that these grants may be revoked?

Mr. McRAE. The bill makes no grant.

Mr. McMILLIN. Well, these privileges.

Mr. McRAE. They are issued by and are all under control of the Secretary of the Interior. The bill makes no grant and vests no title to any lands.

Mr. McMILLIN. I observe that the matter is under the control of the Secretary so far as giving permission is concerned, but does

the bill provide that he may revoke a permit if it should be abused or if it should become to the interest of the Government to have it revoked?

Mr. McRAE. He has the power to do that. But, Mr. Speaker, what I rose to say was that this bill does not make any grant or authorize the making of any grant, and that no person under it can acquire title to any land. No person can get anything but a permit to use for the purpose indicated in the bill.

Mr. McMILLIN. I was anxious, Mr. Speaker, to see that there should not be granted any privileges which would be beyond the control of the Government. I think that the interests of those who are to receive benefits from this action indirectly demand that the power of revocation should exist somewhere, so that privileges given to corporations furnishing light or power shall not be abused. I am glad to learn that that is provided for.

The bill was then passed.

Cong. Rec., vol. 28, p. 703.

The report of the Secretary of the Interior for the year 1899, pages 6 and 7, contained the following statement and recommendation:

Sections 2339 and 2340 of the Revised Statutes, the act of March 3, 1891 (26 Stat. L. 1095, secs. 18-21), the act of January 21, 1895, (28 Stat. L. 635), the act of May 14, 1896 (29 Stat. L. 120), and the act of May 11, 1898 (30 Stat. L. 404), relating to rights of way for ditches, canals, and reservoirs over the public lands and reservations of the United States,



are so confused and so fragmentary in their nature that the department is greatly embarrassed in their administration. For instance, the act of March 3, 1891 (25 Stat. L. 1095), grants rights of way for ditches, canals and reservoirs used for the purposes of irrigation, and the act of May 11, 1898 (30 Stat. L. 404), in its second section authorizes the use of these rights of way for other specified purposes. The latter act, however, instead of granting rights of way for these newly specified purposes, merely enlarges and extends the uses to which rights of way granted for the purposes of irrigation may be applied. Thus a right of way can not be obtained where it is intended to use the water exclusively as a means of creating power to run an electric or manufacturing plant or in hydraulic or placer mining, although when a right of way is once obtained for irrigation purposes it may also be used for these other purposes in a subsidiary way.

The several acts relating to this subject should be *brought together and harmonized in a new act*, the terms of which should be broad and comprehensive enough to afford the widest possible use, for all beneficial purposes, of the waters on the public lands and reservations of the United States, so long as the same is consistent with the *preservation of the public interests* and the attainment of the purposes for which the various reservations are established.

House Report No. 1850, 1st sess. 56th Congress.

In the early part of the first session of the Fifty-sixth Congress the following bill was introduced (H. R. 10225) by Mr. DeVries of California:

*Be it enacted, etc.,* That the provisions of sections 18 to 21, inclusive, of the act of March 3, 1891, entitled "An act to repeal timber-culture laws," etc., are hereby extended and made applicable to rights of way through the public lands, parks, and reservations of the United States for canals, ditches, pipes and pipe lines, electric poles, lines, and plants, flumes, tunnels, or other water conduits, dams, and reservoirs used to promote irrigation, mining, manufacturing, the generation and distribution of electric power, and supplying water for domestic, public, or any other beneficial use. Such rights of way may be obtained by individuals, associations, or corporations where it is intended to use the water for any one or more of the purposes herein named, and any right of way heretofore obtained for a canal or ditch under said act of March 3, 1891, or the act of January 21, 1895, appearing in 28 Statutes at Large, at page 635, or the act of May 14, 1896, appearing in 29 Statutes at Large, at page 120, or the act of May 11, 1898, appearing in 30 Statutes at Large, at page 404, may be used to convey water for any one or more of said purposes: *Provided,* That no such right of way shall be located within or through any park, forest, military, Indian, or other reservation, except upon the express approval of the chief officer of the department or bureau under whose supervision such park or reservation

falls, and upon a finding by him that the same is not incompatible with the public interests.

This bill was reported out on April 12, 1900, with amendments as follows:

Amend the title by striking out the words "for canals and ditches used for irrigation and other beneficial uses" and inserting in lieu thereof the words "through parks, reservations, and other public lands."

Strike out of line 9, page 1, the words "electric poles, lines, and."

Strike out of lines 11 and 12, page 1, the words "the generation and distribution of electric power," and insert after the word "use," in line 13, page 1, the words "and for electric plants, poles, and lines for the generation and distribution of electric power, and for telephone and telegraph purposes."

Strike out of line 12, page 2, the word "no," and insert after the word "shall," line 13, same page, the word "only."

Strike out of line 14, same page, the word "except," and out of line 15, same page, the word "express," and add, after the word "interests," in line 18, same page, the words "*Provided further*, That this act shall not apply to the Yellowstone National Park."

House Report 993; Cong. Rec., vol. 33, pt. 5, pp. 4124, 4560.

The report states that the exigencies "supporting this bill" are fully set forth in the last (1899) annual report of the Secretary of the Interior, quoting his words as we have given them above, and concludes in

the same way as the subsequent report (1850), which we set out below. After the reading of the bill and amendments in the House on April 23, 1900, the following discussion ensued (Cong. Rec., vol. 33, p. 4560):

Mr. PAYNE: Mr. Speaker, this bill is too general and too important to pass in this way. I object. Here is a bill that refers to a dozen other statutes and no man can know what they are without having opportunity to refer to them.

Mr. LACEY: I hope my friend will withdraw the objection, and that will give time for the matter to be fully explained. This is a very simple bill.

Mr. PAYNE: It seems to be a complicated bill, and gentlemen ought to have an opportunity to read the bill and see what laws it refers to. I shall object to its consideration in this way.

Mr. SHAFROTH. It was very carefully drawn by the committee.

Before this bill was again called up a substitute (H. R. 11973), *now the act of February 15, 1901*, was introduced, on which the following report was made:

*Report No. 1850, first session Fifty-sixth Congress.*

Report by Mr. De Vries from Committee on Public Lands submitted May 30, 1900, to accompany H. R. 11973.

The Committee on the Public Lands, to whom was referred the bill (H. R. 11973) relating to rights of way through certain

parks, reservations, and other public lands, beg leave to submit the following report:

The exigencies supporting this bill are fully set forth in the last annual report of the Secretary of the Interior, pages 6 and 7. *This bill differs from H. R. 10225, Fifty-sixth Congress, first session, in that this bill allows permits for the rights of way set forth in the bill, while the former bill made grants in fee of these rights.* The present bill also limits the permits to the Yosemite, Sequoia, and General Grant Parks of the parks.

The report of the Secretary above mentioned is as follows: [quoting the Secretary's report as above given].

The result of the above-stated conflict of statutes has produced the anomaly that while forest reserves are being set aside to preserve watersheds and increase the water supply, the same legislation has denied its use in and for the industries calculated to be benefited thereby. This bill corrects this condition by extending the opportunities to use these waters to mining, electrical, domestic, public, and any other beneficial uses.

The committee, therefore, unanimously recommended the passage of the bill.

June 5, 1900, H. R. 11973 came before the House by unanimous consent. The following discussion ensued:

MR. PAYNE. Mr. Speaker, this bill was up before the House several weeks ago. Since that time I understand the gentleman from California [Mr. DE VRIES] and the gentleman from Massachusetts [Mr. MOODY] have gone

over the bill carefully and proposed certain amendments. I suggest that the proposed amendments be read first before consent is given.

Mr. DE VRIES. The change has come in the form of an amendment.

Mr. LACEY. This is the substitute bill.

Mr. PAYNE. A substitute.

Mr. SHAFROTH. A new bill was introduced covering the ground.

The bill was passed (33 Cong. Rec., pt. 8, p. 6762).

Before the bill was acted on in the Senate, the Secretary of the Interior, in his report for the fiscal year 1900, page LI, referring to the act of March 3, 1891, and the act of May 11, 1898, renewed as follows his recommendation for a complete revision of the right-of-way acts:

In my report for last year it was pointed out that these two acts relating to right of way for canals, reservoirs, etc., together with four other acts upon the same subject, constitute a group of statutes the administration of which has been the source of much embarrassment because of the unnecessarily large number of acts and the confusing amendments, while they do not, after all, cover the whole subject in a satisfactory manner, failing to provide for certain important uses of right of way and being otherwise too limited in scope.

In pursuance of the recommendation of this department that a comprehensive act covering the entire subject should be passed, a draft of a bill was transmitted by the de-

partment to the Committee on Public Lands of the Senate with favorable recommendation, but no action has been taken thereon.

In view of the importance of this matter to the development of the industries of the West which are dependent upon the storage and conveyance of water, the former recommendation is renewed, and it is hoped that some act of the character indicated will be passed.

No discussion of the pending bill seems to have occurred in the Senate. Having been reported without amendment on January 18, 1901 (34 Cong. Rec., pt. 2, p. 1157), it was called up without objection and, on February 7, 1901, passed without dissent. *Id.*, pt. 3, p. 2075.

It is apparent from this record that:

(1) The previous acts, including R. S. 2339 and 2340, were "so confused and so fragmentary" that the Interior Department was embarrassed in their administration, and need existed that they "be brought together and harmonized in a new act, the terms of which should be broad and comprehensive enough to afford the widest possible use, for all beneficial purposes, of the waters on the public lands and reservations of the United States," *so long as this might be consistent with the preservation of the public interests* and the attainment of the purposes of the various reservations.

(2) Certain uses beneficial to the people had, by reason of the fragmentary condition of the statutes, been denied on forest reservations.



(3) The revision of the prior laws, the introduction of the new uses, and the "preservation of the public interests" were intended to be accomplished all together.

The change made in the bill after it was first reported and objected to, and the explanation of the change by the committee, demonstrate the purpose of Congress to substitute revocable permits for perpetual easements.

*(b) The policy of the act is inconsistent with and necessarily supersedes the policy of the act of 1866, so far as concerns the uses here in question.*

We do not see that much elaboration is needed here. If Congress believed that, in the granting of these special privileges, directly under its own act and under the immediate scrutiny of the Secretary of the Interior, it was necessary, "for the preservation of the public interests," that no more than a revocable license should be allowed, and such only under the guidance and control of executive regulations, could it also have intended that, for the very same uses by the same and even wider classes of users,<sup>1</sup> perpetual easements might be obtained at the will of the beneficiaries, by their action alone, without any Federal supervision or control or power of revocation whatsoever, under the blanket permission of the laws or the local customs of a State or Territory?

Though much stronger, the argument here is the same in kind as that which we have already advanced,

<sup>1</sup> The act of 1901 confines its privileges to citizens, associations, and corporations of the United States. The act of 1866 is not so limited.

and which is so well stated by the Circuit Court of Appeals (209 Fed. 554, 560) concerning the act of 1896. Let it be remembered that the Federal policy of conservation is a Federal policy and not a State policy. It is a policy to preserve the subject matter concerned for wise use, in the interest of all the people, in this and succeeding generations, and it works through Federal laws and regulations.

There exists no reason why Congress should guard carefully its own acts and the acts of the Executive of the United States while leaving open the door for selfish and wasteful exploitation and other abuses under the license of State laws and customs. If Congress had distrusted itself and the Federal Executive to the extent that it preferred to confide the cause of conservation to the State governments and popular customs, it would have widened the powers of agency which the act of 1866 conferred, so that by local law or local custom the easements granted by that act might be held under wise restrictions, or lesser interests substituted at the pleasure of the local authority.

It is true that the two acts are not repugnant in the sense that both could not operate concurrently. It would be *possible* to give a power corporation its option to obtain, after some formalities, a revocable permit, subject to regulations, or to obtain a perpetual easement, entirely free from regulation, by merely appropriating the ground. Such a liberty of choice might conceivably be given, but to admit that it was given would be to cast a slur upon the intelligence of

Congress. *Lau Ow Bew v. United States*, 144 U. S. 47, 59.

The inclusive and exclusive function for which we contend is manifested not only by the language of the act, its direct and striking relation to the prior acts which it absorbed, and its legislative history, but also (as observed by the Court of Appeals, 209 Fed. 561) by the growth of policy evidenced in the whole series of related statutes of which it is a member. First we have the liberal policy of the act of 1866, adopted to aid the settlement of a vast new country, where the value of land and of proprietary control by the Government was as nothing compared with the need for men and their industries. This was a policy already fashioned by the inhabitants, which Congress adopted. Next came the legislation concerning desert land and reservoir sites, which meant that the Government was to take a direct hand in the problem of storing and conserving water. Next the act of 1891, which, though it left the act of 1866 unscathed, showed the tendency of Congress to deal with the subject matter directly through Executive scrutiny and Executive regulations. The additional privileges and functions created by that act might have been put under the management of the States, but Congress preferred to treat them as matters for the Federal Government without extraneous assistance. The privileges were confined to the one use of irrigation, not extended broadly as in the act of 1866, and the employment of the rights of way was strictly limited to the single purpose. The statute itself (sec. 20) declared the

measure of diligence in construction, and affixed the consequence of undue delay. The permit acts of 1895, 1896, and 1898, and the limited addition by the last to the privileges conferred by the act of 1891, show a crystallized policy, coeval with the policy of creating and regulating the use of forests, known as the Federal policy of conservation. The privileges described in these acts come solely through the General Government as a result of Executive action which *precedes* the use. The beneficiary is not left free to appropriate the land, whatever the State law may say upon the subject, nor is he allowed the fee. The privileges are granted and guarded by the Federal Government. All this applies to the ways for storing and transporting water—uses mentioned in the act of 1866—as well as to other uses, allowed for the first time by these conservative laws. At length we find the same policy summed up and extended in the act of 1901.

Minds may differ widely on the wisdom of this policy, but none can deny its existence. Large enterprises, restive of supervision and confident of the sympathy of the State authorities where the property of the State is not concerned, naturally prefer the loose, if not prodigal, policy evolved under the act of 1866, which gave in perpetuity without restriction and without inquiry or supervision from any source. It is not likely that such a policy will ever be restored, much less extended. On the other hand the efforts which have gone on in Congress for many years to modify the stringency of the act of

1901, so that something more substantial may be vouchsafed than a revocable permit, have borne some fruit in the acts of February 1, 1905 (discussed *infra*, p. 85), and in that of March 4, 1911 (36 Stat. 1235, 1253; Appendix, p. xi). The former allows rights of way in the forests subject to regulation, during the period of beneficial use, for municipal and mining purposes and for the milling and reduction of ores; the latter 50-year easements, over both reservations and public lands for electrical power, telegraph and telephone lines, also subject to regulation and to executive forfeiture for abandonment or two years' nonuse.<sup>1</sup>

In neither of these acts, however, do we find a tendency to revert toward the policy of 1866. They are reiterations and applications of the policy of Federal control.

Applying the act of 1896 the Court of Appeals observes:

There can be no doubt that Congress intended to and did assume complete control of the subject matter, and made and authorized specific and comprehensive provisions respecting it. This appears not only from the act in

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<sup>1</sup> Oddly enough, the brief of the Utah Power and Light Company (p. 82) finds in this act an evidence of the belief of Congress that structures for the storage and conduction of water were "adequately protected" by the act of 1866. The argument is that if Congress had not so believed it would certainly have allowed the water use, which is the more important, to share the liberality of this new act. In reply it seems enough to suggest that it is the vital importance of water power to the whole country and the naturally limited opportunities for its successful employment, which have made it so difficult for Congress to amend the law on the subject (act of 1901) without exciting the disappointment and incurring the continual opposition of these large water-power concerns.

question, but from other legislation connected therewith and supplemental thereto.

*United States v. Utah Power & Light Co.*, 209 Fed. 554, 561.

The reasoning of the court in that case [209 Fed. 554] applies with more aptness and force to the act of February 15, 1901, than to the act there under consideration, and it can not be doubted that the conclusion reached there should be applied here. For these reasons we must measure the rights and obligations of the defendant by the act of February, 1901.

*United States v. Colorado Power Co.*, recently decided by the District Court in Colorado.

The general principle which we deem applicable is well stated in the following quotations:

Even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

*United States v. Tynen*, 11 Wall. 88, 92.

Neither the intention to substitute nor the intention to create an exception from the general law depends upon inconsistency between the new or special act and the old or general act, in the sense of repugnancy in terms. It is inconsistency in point of intention, an obvious, but unexpressed repugnancy.

It is a mere question of whether the legislature intended to make a complete law governing the subject matter. If that be apparent, there is a substitution or an exception, as the case may be, although there is no express

repeal, exception or substitution, and the two acts might be combined by making the later or special one an addition to the older or general one and treating it as an amendment whereby a different result would be obtained. In every case of this kind the two courses are open to the court. Both acts may be allowed to stand and operate together by treating the later or special one as an amendment and certain results thereby obtained; or the new or special act may be considered a substitute or exception, and the old or general statute thereby set aside either wholly or partially, and a different result so obtained; and the doubt is always resolved by the character of the new act or special provision. Though it fails to denominate itself a substitute or exception in terms, the intent to make it such is gathered from its scope and character and carried into effect.

*Hawkins v. Bare*, 63 W. Va. 431, 437.

Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes, relating to the same subject, be not in terms repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the original act.

The rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject matter, and from the framework of the act it is apparent that the legislature designed a complete scheme



for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones on that subject which shall be obligatory.

*Roche v. Mayor*, 40 N. J. L. 257, 262.

When a revising statute covers the whole subject matter of antecedent statutes, the revising statute virtually repeals the antecedent enactment, unless there is something in the nature of the subject matter or the revising statute to indicate a contrary intention.

*Kohlsaat v. Murphy*, 96 U. S. 153, 158.

The doctrine as to repugnant provisions of different laws is well settled, and has often been stated in decisions of this court. A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the legislature. And although, as a general rule, the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject.

*Cook County Nat. Bank v. United States*, 107 U. S. 445, 451.

If one statute enacts something in general terms, and afterwards another statute is passed

on the same subject, which, although expressed in affirmative language, introduces special conditions or restrictions, the subsequent statute will usually be considered as repealing by implication the former; for "affirmative statutes introductory of a new law do imply a negative." \* \* \* And if the coexistence of the two sets of provisions would be destructive of the object for which the later act was passed, it is clear that there must be an implied repeal.

*Black, Interpretation of Laws* (2d ed.), 354.

In *United States v. Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 707, 708, Mr. Justice Brewer, after referring to the acts of 1866, 1877, and 1891, said of section 10 of the act of September 19, 1890 (26 Stat. 454), which prohibits the creation of unauthorized obstructions to the navigable capacity of waters:

As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes, it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act. This act declares that "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction, is hereby prohibited." Whatever may be said in reference to obstructions existing at the time of the passage of the act, under the authority of State statutes, it is obvious that Congress meant that thereafter no State should

interfere with the navigability of a stream without the condition of national assent. \* \* \* Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question. And it would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream.

(c) *Reflections on the proposition that the act was designed to extend the privileges of the act of 1866 by reserving rights of way "in advance of construction."*

Realizing, no doubt, the impossibility of reconciling both acts as independent sources of the right to use, opposing briefs insist that the act of 1901 does not mean what it says; its real (though artfully concealed) purpose is not to commission the Executive to "permit the use," but rather to provide a method whereby lands may be reserved or withdrawn upon application until the applicant has opportunity to occupy them with a completed structure and thus gain his easement under the State laws or customs with or without the cooperation of the act of 1866.

This theory contradicts the language of the act, its history, and its executive construction, not to mention

the obvious policy and the settled construction of the whole series of acts to which it belongs. It extends the act of 1866 not only over the public lands but also over the "forest and other reservations," and the Yosemite, Sequoia, and General Grant National Parks, where it never could have applied. Combined with the dogma that the permits must be ministerially granted upon demand, and even without it, it converts the instrument of conservation into a weapon of destruction.

The legislative history affords not the slightest color for the contention that the act was meant, not to replace the existing laws, but merely to supplement the privileges conferred thereby. While undoubtedly one purpose was to make the public domain, and especially the reservations, more available for use, nothing could be plainer than the purpose to include all that was in the prior laws with all that was new in the single system to be formulated; nor than the purpose to adopt the plan of requiring Executive permission under rules and regulations for all the uses and privileges without distinction. The latter purpose stands out not only in the Secretary's recommendation, but even more strongly in the fact that the first bill, which provided for easements in some cases and permits in others was changed, so that permits were provided for in all cases. Reference to the regulations and uniform practice of the Interior and Agricultural Departments will show that this act and the various others of like character

which preceded it have always been administered without question as the sources of the right to use.

(d) *Construction by the department.*

The Interior Department has always treated this act as superseding the earlier permit acts, and as the sole source of authority to use the public domain and forests for commercial power purposes. See *Kern River Company*, 38 L. D. 302, 308.

Its circular of July 8, 1901 (31 L. D. 13), paragraph 1, reads:

1. This act, in general terms, authorizes the Secretary of the Interior, under regulations to be fixed by him, to grant permission to use rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks in California, for every purpose contemplated by acts of January 21, 1895 (28 Stat. 635), May 14, 1896 (29 Stat. 120), and section 1 of the act of May 11, 1898 (30 Stat. 404), and for other purposes additional thereto, except for tramroads, the provisions relating to tramroads, contained in the act of 1895 and in section 1 of the act of 1898 aforesaid, remaining unmodified and not being in any manner extended.

Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way, contained in the acts referred to, yet, considering the general scope and purpose of the act, and Congress having, with the exception above noted, embodied therein the main features of the

former acts relative to the granting of a mere permission or license for such use, it is evident that, for purposes of administration, the later act should control in so far as the same pertains to the granting of permission to use rights of way for the purposes therein specified. Accordingly all applications for *permission* to use rights of way for the purposes specified in this act must be submitted thereunder. Where, however, it is sought to acquire a right of way for the main purpose of irrigation and for public or other purposes as subsidiary thereto, as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat. 1095), and section 2 of the act of May 11, 1898, *supra*, the application must be submitted in accordance with the then existing regulations issued under said acts.

This same language was carried into the later circulars, including that of June 6, 1908 (36 L. D. 580). In the regulations of August 24, 1912 (41 L. D. 150), and March 1, 1913 (*Id.* 532), no substantial change was made beyond adding the act of March 1, 1891, to the statutes named in the first paragraph. Why the distinction between that act and the others does not clearly appear. The matter of chief significance in the departmental attitude is that first the act of 1896 and next the act of 1901 were accepted as the exclusive authority for acquiring rights of way for commercial power enterprises.

In an opinion by the Assistant Attorney General (30 L. D. 588), the act of February 15, 1901, was construed in comparison with an act approved March 3rd

of the same year (31 Stat. 1058, 1083), conferring rights of way through Indian reservations for telegraph and telephone lines. As the later act provided for a right of way in the nature of an easement, which could only be granted upon payment of proper compensation to the Indians, and involved also the payment of an annual tax for their benefit, it was held not inconsistent with the earlier act, though each embraced the uses in question. The later act gave a greater right, but imposed a greater burden. The earlier gave less and required less.

**The act of February 1, 1905 (33 Stat. 628, sec. 4).**

This is the act (Appendix, p. xi) which transferred the administration of the national forests from the Department of the Interior to the Department of Agriculture.

(a) *By its terms the act may be applied only to land within forest reservations.*

(b) *Commercial power enterprises are not included.*

As was said in the case of *Northern California Power Co.*, 37 L. D. 80:

This act was evidently drawn in the sole interests of municipalities and miners, and the limitations upon the use of the privilege granted are such as to authorize, if not demand, especial scrutiny of the purposes of the projectors of the enterprise before giving approval to an application filed under said act.

Even if the privileges sought might be used in the operation of mining property, owned or controlled by the applicant, where it appears that this use would be but incidental to the



real purpose of the projectors, which is to generate power for commercial purposes, the application should be rejected unless, after due opportunity, the application is amended and the right sought under the act of 1901, for it was clearly never intended by the act of 1905 to confer upon commercial power companies greater privileges within forest reserves than might be enjoyed elsewhere upon the public domain, which would seem to be the effect of the approval if given under that act.

See also *Alaska Treadwell Gold Mining Co.*, 40 L. D. 427, where it was said:

The rights and uses described within said section, with the exception of municipal use, are all for purposes connected with or incident to mining.

And again (p. 428):

With reference to the application in the case at bar, the maps and other papers are not before the department, but if, as stated, they seek a right of way "for the main purpose" of generating electrical power for non-commercial purposes, this showing does not meet the requirements of the statute in question, as it only authorizes the granting of rights of way for the purposes therein specified and not for other uses or purposes, even though the latter may be subordinate to the purposes specified in the act.

It may be that in some of the operations contemplated by this act the development of electrical power may be convenient, or even necessary, but it hardly

could be contended in seriousness that a statute specifying municipal and mining purposes may be availed of by a power company organized for the purposes of selling electrical power to all comers and for all conceivable uses.

It was said by the Circuit Court of Appeals in the case of the *Utah Power & Light Company*, 230 Fed. 328, 333:

Conceding, without deciding, that the term "municipal" is alone enough to cover and embrace all the domestic and other beneficial uses enumerated in prior acts relating to the same subject, still, in view of the specific and distinctive enumeration of such uses, which the Congress had thought necessary to adopt in such previous legislation, this term can hardly be accorded such a broad significance unless this act be regarded as a supplement to, rather than a substitute for, what went before; and such it undoubtedly was. There is no reason whatever to regard this act as a departure from the governmental policy on this subject, as evidenced by legislation, beginning at least with the act of 1891 and developing steadily in the direction of governmental control and conservation of the resources of the Nation; but, on the contrary, it was more logically a progressive step in the same direction. It follows that all these acts are *in pari materia*, and should be construed accordingly.

Furthermore, the legislative history shows clearly that the purpose was to limit the uses to mining and

milling and to the uses of municipalities. Section 4 was offered by Senator Kittredge as an amendment to the bill, which had originated in the House (Cong. Rec., vol. 39, pt. 1, p. 964). The House disagreed (Cong. Rec., vol. 39, pt. 2, p. 1119). As it originally stood, the section did not contain the word "municipal." The conference report recommended the insertion of the words "municipal or" before the word "mining" (*ib.*, p. 1369). Mr. Lacey, one of the conferees, in explaining the bill and amendment as agreed to, said:

The next amendment is as to rights of way. The Senate made a provision that rights of way for ditches for mining purposes should be in the nature of an easement instead of, as at present, a mere license. The conference committee recommended that the section be amended by giving the same privilege to municipalities as is given to mining companies, because *there are some towns* which get their water power for electric lighting out of the ditches from forest reserves,

And the report was agreed to (*ib.*, p. 1370). The report was agreed to in the Senate without debate (*ib.*, p. 1397).

(c) *The act does not grant rights of way for transmission lines or tramways.*

Attorney General McReynolds fully considered this in 30 Op. 263, where he said:

The rights granted are described with particularity. The right of way for transmitting and distributing electrical power is not included

expressly, nor is it so intimately related to any of the rights enumerated that a grant of the one must needs be implied as essential to the enjoyment of the other \* \* \*.

Furthermore, it is quite reasonable to suppose that Congress, though willing to grant the rights which are specified, was not prepared to burden the forests with other rights of way "during the period of their beneficial use" to suit the particular plans of individuals and corporations. Provision had already been made for the granting of revocable permits or licenses to cover a wide variety of uses (act of February 15, 1901, *infra*), and this may well have been regarded as quite enough to insure the full enjoyment of the higher privileges expressly mentioned in the act of 1905.

(d) *The defendants have not received the permission nor complied with the rules and regulations contemplated by this statute.*

The regulations promulgated by the Secretary of the Interior under this act will be found in 33 L. D. 451; 34 id. 234; 36 id. 584. They provide for applications for rights of way under the act, and declare that no construction can be allowed until such application has been approved. No such applications have been made by the defendants and the permission necessary to vest the grant has not been obtained; hence, for this reason alone, defendants can not claim the benefit of the act.

The grant made by the statute expressly authorizes the regulations. Congress has the power to impose conditions, and this it may delegate. Compliance

with those conditions is plainly a condition precedent. The requirements of an application, an approval, and a record are such elementary and essential things preliminary to a grant that they must be held to be the things Congress intended. Having taken none of the steps required by the regulations, and having failed to secure the approval contemplated by the statute, they can claim no rights under it.

*Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301.

*United States v. Hitchcock*, 190 U. S. 316.

*Shepley v. Cowan*, 91 U. S. 330.

*Mills v. Stoddard*, 8 How. 345.

*Frisbie v. Whitney*, 9 Wall. 187.

### III.

*Rights for the storage and conduction of water could not be acquired under the act of 1866 where the use of the water involved the tortious construction and operation of power houses, transmission lines, or other structures upon land of the United States.*

The object in granting rights of way for ditches, etc., was to make possible the employment of the water to be conveyed thereby in beneficial uses recognized by the act and the local laws and customs. A beneficial use implies a rightful use. A use which is impossible without violating the property rights of another is no use at all, in the eye of the law, at least when it is set up as a basis for results derogatory to his interests.

In *Snyder v. Gold Dredging Co.*, 181 Fed. 62, the Circuit Court of Appeals for the Eighth Circuit had

occasion to consider whether A, by wrongfully enlarging his ditch on B's land, could acquire such a right to the increase of water thus diverted and carried as would prevent B from diminishing the flow by certain mining operations which increased the seepage from the ditch. From the opinion, which was delivered by Mr. Justice Van Devanter when circuit judge, we extract as follows (p. 69):

The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that can not be done without a grant from the landowner or a lawful exercise of the power of eminent domain; and this, although the particular circumstances be such that the proposed appropriation can not be effected without the ditch.

Page 70:

Thus it was essential that the right so to alter the ditch and to enlarge its use be acquired through a grant from Wells or through a resort to appropriate condemnation proceedings. But as no such right was acquired the change made in the ditch and its enlarged use were as unlawful and as much a trespass as would have been the construction and use of an entirely new ditch in the like circumstances. And not only was the increased water appropriation initiated by means of this trespass, but the maintenance and

enjoyment of that appropriation are dependent upon a continuance of the trespass.

In these circumstances it seems altogether clear that the defendant, who practically stands in the shoes of Wells, is not bound to recognize and respect that appropriation.

The law not only looks with great disfavor upon claims which are grounded in and sustained by a trespass, but regards them as of no validity against those whose property is the subject of the trespass, save when by acquiescence or neglect the right to object to it is waived or lost.

The principle applied in that and similar cases rules also in the cases at bar. Although the diversion and use of the water antedated the interference of which the water-user complained, he was denied relief because his alleged water right, dependent in its genesis upon a legal wrong, was a thing to which the law could not accord protection without self-stultification. If the trespass had consisted, not in the enlargement of the ditch, but in the occupation of some other portion of the land with works for utilizing the water, and if the use there had been the only use to which the claim of water right could be related, the case would have been the same in principle.

The water rights contemplated by the act of 1866 and the local laws to which it refers, and particularly the law of Utah, depend on beneficial use of the water. There must be a *bona fide* intention existing from the



inception of the claim to apply the water to such a use when the diversion is accomplished.

All of the authorities agree upon this proposition that, in order to make a valid appropriation of waters, under the arid-region doctrine, there must be first an intention upon the part of the appropriator to apply the water appropriated by him to some beneficial use or purpose; and, without this intention, it is held that no valid appropriation is made and that the water is subject to appropriation by other parties.

2 *Kinney on Irrigation and Water Rights* (2 ed.), section 708, citing many cases.

*Sowards v. Meagher*, 37 Utah, 212, 222.

Such rights remain inchoate and do not vest until the water has been actually applied to a beneficial use.

The actual application of all the water appropriated is the consummating act necessary to complete a valid appropriation, and the continuation of that use, or some other beneficial use, constitutes the continuation of the title to the water right in the appropriator; and there can be no right to take the water unless it is applied to some beneficial use. This proposition is so thoroughly settled by all the statutory law and court decisions that a citation of authorities seems almost unnecessary.

2 *Kinney, ubi supra*, section 725.

See also *Combs v. Agricultural Ditch Co.*, 17 Colo. 146;

*Hewitt v. Story*, 64 Fed. 510.

In *Sowards v. Meagher*, 37 Utah, at page 223, the court says:

The final step, and the most essential element, to constitute a completed valid appropriation of water, is the application of it to a beneficial purpose. Whatever else is required to be or is done, until the actual application of the water is made for a beneficial purpose, no valid appropriation has been effected. This was so before the statute, and it is still so under the statute.

Similarly, under the desert-land law of March 3, 1877 (19 Stat. 377), it is declared that the right to use water in the reclamation of land under that act—

Shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

In the absence of a valid water right, vested or *in fieri*, there can be no valid ditch right. Section 2339, Revised Statutes, only protects such water rights as "have vested and accrued" under the local law, and it allows the right of way only for the enjoyment of such rights.

*Jennison v. Kirk*, 98 U. S. 453.

This is made plainer by section 2340, which declares that patents and entries allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

In *Nippel v. Forker*, 26 Colo. 74, 78, the Supreme Court of Colorado held:

Section 2339, Revised Statutes of the United States, is a recognition by Congress of water rights that have become vested and accrued and acknowledged by the local customs and laws, and it contains also a confirmation of the right of way of ditches and canals that have been constructed through public lands for the utilization of such water rights. Section 2340 directs that all patents allowed shall be subject to any vested water rights, or rights to ditches and reservoirs used in connection with them.

Even if the issues raised that question, there is no proof of any vested or accrued water right in the plaintiff acquired under or recognized by section 2339. He therefore can not, under these sections, maintain his claim to this reservoir, for he has established no vested water right in connection with which to predicate it. As it is only the right to, or the right of way for, such ditches and reservoirs as are used in connection with a vested water right that the owner of the latter can assert, unless he first acquires a vested and accrued water right, he is not entitled to an

easement over any public lands for a reservoir used in connection therewith.

The Supreme Court of Idaho, in a recent decision, expresses the same view:

Said sec. 2339, Rev. Stats. of the U. S. (7 Fed. Stats. Ann. 1090, Comp. Stats. 1901, p. 1437), clearly contemplates that one who seeks the benefit of the right of way for ditches over public lands must have some rights to the use of water which are recognized and acknowledged by the local customs, laws, and decisions of the courts of the State wherein such system is being constructed before it is entitled to the right of way for the construction of ditches or canals for the purposes specified in said section. Said section, being reduced to its clear meaning, might be read as follows: "Whenever rights to the use of water have vested and accrued, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." "For the purposes herein specified" unquestionably means for the purpose of maintaining and protecting the owners and possessors of water rights which have vested and accrued.

\* \* \* \*

The easement for a right of way is entirely dependent upon the use, and if there is no use for the ditches under the original purpose there can be no easement.

\* \* \* \*

The provisions of said section 2339 were not intended to give anyone the right to secure title to the right of way for segments of canals and maintain possession thereof merely because they built them without putting them to some use, and, in this case, the use for which they were intended.

*Crane Falls, &c., Co. v. Snake River, &c., Co.*, 24 Idaho 77, 80, 81, 84.

See, also:

*Clear Creek Co. v. Kilkenny*, 5 Wyo. 38;

*Taylor v. Abbott*, 103 Cal. 421;

*Cleary v. Skiffich*, 28 Colo. 362.

So, also, where the right of way comes by operation of the grant contained in this act of Congress. It becomes vested only upon a compliance on the part of the canal owner with the local laws, customs, etc., and ownership is acquired as the work progresses, and the priority to the water, as well as the right of way, becomes vested only upon the completion of the work of construction, and the application of the water to a beneficial use.

*Jarvis v. State Bank*, 22 Colo. 309, 314.

It is settled by a decision of this court that the right of way does not vest until the canal, by its completion, is available for the beneficial use.

So far as the public land is concerned, over or through which these ditches for the canal were dug, the statutes above cited create no title, legal or equitable, in the individual or company that simply takes possession of such land. The Government enacts that any one may go upon its public lands for the purpose of procuring water, digging ditches for canals,

etc., and when rights have become vested and accrued which are recognized and acknowledged by the local customs, laws, and decisions of courts, such rights are acknowledged and confirmed. Under this statute no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the Government in the party entering upon possession from the mere fact of such possession unaccompanied by the performance of any labor thereon.

*Bear Lake Irr. Co. v. Garland*, 164 U. S. 1, 18.

It is the doing of the work, the completion of the well, or the digging of the ditch, within a reasonable time from the taking of possession, that gives the right to use the water in the well or the right of way for the ditches of the canal upon or through the public land. Until the completion of this work, or, in other words, until the performance of the condition upon which the right to forever maintain possession is based, the person taking possession has no title, legal or equitable, as against the Government.

*Id.*, p. 19.

To like effect, *United States v. Rickey Land & Cattle Co.*, 164 Fed. 496, 499.

In *Sowards v. Meagher*, 37 Utah, 212, the Supreme Court of Utah makes it very plain that no valid appropriation of water can be made for a use which would involve a trespass on the land of the United States. We quote from page 224:

Bearing in mind that an appropriation of the waters as here proposed by the applicants

is not made until the waters have been applied to the beneficial purpose for which the proposed appropriation was applied for, the irrigation of certain designated lands, if, when the diverting channels and works, prosecuted with reasonable diligence, are completed, the water may not then lawfully be used on such lands because they remain and still are a part of the reservation, or of the public domain, unclaimed, unsettled, and unoccupied, or if the lands have since been restored to the public domain, and since have been lawfully claimed, occupied, and possessed, but such persons so occupying and possessing the lands refuse to take or use the water thereon or to apply it to the beneficial purpose for which the appropriation was applied for, the application, and the construction works, and the moneys expended thereon by the applicant are for naught.

To conclude: The act of 1866 intended to grant rights of way only for use in connection with water rights, which in turn depend on beneficial and lawful uses. No right of way can be acquired without such use. Construction or possession of works can not confer the right of way, either alone or in connection with a use which is itself a continuing trespass against the United States. It is especially to be remarked that Congress could never have intended to grant rights of way for the purpose of invading the property rights of the Government.



## IV.

APPLICATION OF THE FOREGOING TO THE FACTS OF  
EACH CASE.**1. No. 202, Utah Power & Light Company.**

In this case the water appropriation was applied for under the Utah law in 1905, and the works constructed subsequently and put in operation before the land was reserved.

The act of 1901 plainly governs, except as to the power house and transmission line which are on private land. Defendant, to legalize its status, may obtain a permit under that act for its conduits, pressure pipe, and reservoir. For its telephone line it may acquire a 50-year easement under the act of March 4, 1911, or a permit under the act of 1901. If the tramroad can not be permitted under the act of 1901 as part of an "electrical plant," possibly it might be permitted under the forest regulations. Clearly the telephone line, tramway, and accessory buildings would not come within the act of 1866, even if it had not been affected by the later legislation.

**2. No. 204. Beaver River Power Company.**

The vague references to water-right appropriations in 1895 are inconsequential. If the defendant intended to rely upon them, it should have stated how the water was then appropriated, for what uses and upon what land, how the defendant fell heir to the water right, and precisely how that right is related to the works complained of. The answer itself shows that defendant's "predecessors" were engaged in making the water appropriation in October, 1905, and that the works were in process of being constructed during the years 1906, 1907, and 1908. Operation began in April, 1908 (defendant's brief, p. 7).

The act of 1901 is, therefore, clearly applicable to the case, since it was in force before the work was even begun.

Not only so; the land was reserved temporarily August 20, 1902; part of it was permanently incorporated in the forest on January 24, 1906 (34 Stat. 3189), and the rest on April 25, 1907 (35 Stat. 2128). The proclamation excepted only—

Land which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided*, That this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made.

The lands embraced by the proclamation of 1906 include all those upon which the pipes and conduits (except part of the main conduit) were later installed, and also the reservoir in township 30 south, range 5 west (*cf.* map in bill with map in proclamation). The lands embraced in the proclamation of 1907 include those upon which the rest of the main conduit, the power house and other buildings, and the section of transmission line were installed (*cf.* map in bill with map in proclamation). Did either of the two departmental orders intervening between

the original withdrawal order and the proclamations alter the status of the land so far as the defendant is concerned? We think this question is not presented, because the answer is utterly insufficient to show what was done in the way of occupying and working upon the land before the proclamations, and the defendant would not fall within the exception in the proclamations, in the absence of a vested right. (See *Boise Forest*, 28 Op. 587.) We remark again that the Commissioner's order of April 18, 1904, purported to restore the lands described in it to settlement and entry only (Appendix, p. xiii). That order included many sections and entire townships. Obviously it was not made to accommodate the plans of the defendant or its predecessors. Of the lands here in controversy it affected only the four sections on which the power house and buildings and part of the main conduit and telephone lines are located. These sections were all included in the proclamation of 1907. What, if anything, was done upon them before that proclamation the answer fails to describe. The remaining lands in controversy were included by the order of October 5, 1905 (see Appendix, p. xiv). This also included large areas of other land and purported to restore them "to settlement only." They were permanently put in the reservation by the proclamation of January 24, 1906. What had the defendant or its predecessors done on any of these lands between those two dates? The answer is so vague and incomprehensible on this

subject that one might well be pardoned for assuming that they did nothing, especially in view of the fact that the restoration was too narrow to include their case. The water supply and feeder conduits, as well as nearly half of the trunk conduit, are entirely on these lands, and it is evident that the power house and transmission line would be quite useless without them.

What the answer really seems to claim is that the enterprise was projected before June 15, 1906; that prior to that time defendant's "predecessors" had expended "large sums" toward appropriating the water to some use other than defendant's present use; that executive officers signified their purpose to create the permanent reservation, and some informal understanding was had to the effect that, when that had been done, a right of way would be approved under the act of February 1, 1905. (See defendant's brief, pp. 12 *et seq.*) The proclamation of 1906 was then issued, and the construction of the works proceeded, with the knowledge of the officers, during that and the two next following years. We fail to see the importance of the situation thus portrayed. The act of 1905 does not apply to the defendant's present business. One must assume that the Government officials believed that the defendant's predecessor intended to bring its business within the purposes of that act. Even if we assume that they were honestly mistaken as to its scope, we can not assume that the

reservation was the result of the mistake; nor, even if it was such, would the consequences of the reservation be altered.

Defendant has gained no right to maintain and operate the reservoir or pipe lines, first, because the act of 1866 was superseded in respect of power uses by the acts of 1896 and 1901; second, because the act of 1866 never applied in forest reservations; third, because the use, through the power house and transmission line, was in trespass, and the act of 1866 did not grant rights of way to assist in the commission of a continuing trespass on Government land; fourth, because the defendant and its predecessors have not attempted to comply with the act of 1901 or the forest law and regulations, but have defied them as inapplicable and void.

The power house and other buildings, the telephone and transmission lines, could not be authorized under the act of 1866 even if it had not been superseded as above stated.

### 3. No. 206, Lucien L. Nunn.

According to the answer, the water appropriation was initiated and the works constructed and put in operation "during the years 1900, 1901, and 1902." The land was withdrawn temporarily in August, 1902, and reserved permanently January 24, 1906 (*cf.* map in bill and map in proclamation, 34 Stat. opp. p. 3189). The answer fails to meet the bill, in that it does not attempt to disclose what had been

done prior to the act of 1901 or prior to the withdrawal. The answer is, therefore, insufficient. Assuming, however, that the remedy in that regard was to move to make it more specific, it still presents a definite and incurable weakness. It shows on its face that the whole claim of the defendant originated long after the permit acts of 1895 and 1896, *supra*, had come in operation. The original use was for mining and supplying a mining town with electricity for light, heat, etc. For the first of these uses a permit should have been obtained under the act of 1895. For the rest, if not for all, and for the general commercial distribution and sale, to which the business has since been extended, a permit should have been obtained under the act of 1896 or the act of 1901.

Again, while one power house is on private land, the second power house and all the other elements of the two plants are on land of the United States. Neither the latter power house, nor the conduits which supply it with water, nor the dwellings, stables, transmission lines, and telephone lines can be justified under any tenable theory of the act of 1866, even if that act survived the act of 1896, as applied to electric power operations.

## PART SECOND.

Showing that defendants have acquired no rights from the State.

## I.

*The State has not undertaken to authorize the appropriation of any of the lands in controversy.*

- (1) **The State legislation relied on does not purport to be an exercise of sovereignty over public lands of the United States, much less over lands reserved for forest purposes.**

By the act of February 20, 1880 (Laws of 1880, ch. 20, sec. 15, p. 40; Comp. L. 1888, sec. 2788), the legislature of Utah Territory declared that all persons should have "the right of way across and upon public, private, and corporate lands" for reservoirs, canals, and other means of securing or conveying water for any necessary public use, "upon payment of just compensation therefor."

It is argued that, because the Territory owned no public lands, the public lands intended by this enactment must have been public lands of the United States; and it is next argued that because, by the enabling act (July 16, 1894, 28 Stat. 107, sec. 19) and the State Constitution (art. 24, sec. 2) all laws "in force" in the Territory should be in force in the State and remain so until expired by their own limitations, or until altered or repealed, therefore this law, adopted as a State law in that general way and since retained as such, has always possessed the meaning which it had when it was enacted by the Territory.



This rather ingenious argument is offered because if the law, as we now find it, were treated as a law created by the State, the term "public lands" could reasonably be referred to the public lands of the State which it gained under the enabling act.

The fallacy of this whole line of reasoning is readily exposed. The organic act of the Territory positively forbade the legislature to pass any law "interfering with the primary disposal of the soil." Act of September 9, 1850 (9 Stat. 454; R. S. § 1851). It is also provided that all Territorial laws should be submitted to Congress and, if disapproved, should be "null and of no effect." (R. S. § 1850.) If it were true that the act of 1880 intended to grant rights of way in the lands of the United States without the consent of Congress, it was to that extent void as attempting a primary disposition of the soil; and the fact that this, along with other laws, was submitted to Congress and not affirmatively disapproved, so far from validating the void act, as is claimed in opposing briefs, is entirely immaterial, since it is thoroughly established that the mere inaction of Congress in such a matter will not operate to instill life into a Territorial statute which was void at its enactment.

*Berryman v. Board of Trustees*, 222 U. S. 334, 353.

*Clayton v. Utah*, 132 U. S. 632, 642.

In so far as it was invalid, the Territorial act was not adopted as a law of the State by the general provisions of the enabling act and State constitution to which we have referred. Those provisions related to the acts of the Territorial legislature which were "laws,"

and as such "in force" when the change of sovereignty took place. They were not intended to adopt as State laws attempted enactments of the Territorial legislature which were never valid but always "void and of no effect."

See *United States v. Mackey*, 214 Fed. 137, 148.

The validity of the Territorial act, however, need not be questioned. The legislature was fully authorized by R. S., section 2339, to provide for rights of way for the purposes named over the public lands of the United States, and the Territorial act as applied to such lands does not exceed the permission. It is quite possible that the legislature meant also the public lands of the Territory—the lands which were reserved by the enabling act (9 Stat. 457, sec. 15), and the act of February 21, 1855 (10 Stat. 611), "for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be created out of the same."

As reenacted by the State in 1897 (Laws of 1897, ch. 52, sec. 17, p. 223; R. S., 1898, sec. 1277; Comp. L. 1907, sec. 1288 x 21), the provision is substantially the same as in the act of 1880, allowing the rights of way upon "public, private, and corporate lands \* \* \* upon payment of just compensation therefor." The act of 1897 added: "Such right may be acquired in the manner provided by law in the taking of private property for public use."

The eminent-domain law of Utah, in enumerating the classes of property subject to condemnation, includes, besides private property, "lands belonging

to the State, or to any county, or incorporated city or town, not appropriated to some public use." Also "property appropriated to public use, provided that such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated." (R. S. 1898, sec. 3590; Comp. L. 1907, sec. 3590.) These sections do not, upon any theory, include Federal property, and they serve to reflect the intention of the legislature in the act of 1897.

The State land board is authorized to exact a price for rights of way over State lands (Comp. L. 1907, sec. 2364). The law of 1897, as we have seen (Comp. L. 1907, sec. 1288 x 21), provides for compensation and declares that the right of way across public, as well as other, lands may be acquired in the manner provided by law for the taking of private property for public use. The eminent domain law (*loc. cit.*, sec. 3593 *et seq.*) provides for jurisdiction and specific procedure in the courts for the taking of property.

In all this there is no mention of the United States. The State has consented to be sued in respect to her own public lands, but she exacts compensation, in some cases at least, and she has not attempted to devise a process for taking the lands of the United States without compensation or with it.

Properties and prerogatives of the United States are beyond the operation of statutes unless specifically named therein.

*United States v. American Bell Tel. Co.*, 159 U. S. 554.

If this is true of an act of Congress, *a fortiori* must it apply to an act of a State designed for the taking of property in condemnation proceedings, for the United States could not be impleaded without its consent, in any suit, in any court. Such consent has never been given. No officer has been authorized by Congress to accept service of process and no court has been given jurisdiction of such a case. No method has been provided for receiving and depositing the compensation awarded.

Even if the United States had been expressly mentioned, as it was in a law of California, the act would be construed as conditioned on the consent of the United States to be sued.

*Kansas v. United States*, 204 U. S. 331.

*Deseret Water, Oil & Irr. Co. v. California*, 167 Cal. 147.

The latter case, upon rehearing, was disposed of upon another point, 167 Cal. 162, but the reasoning in the opinion cited is none the less sound.

- (2) **The act relied on applies only to the means of storing and conducting water.**

It does not authorize the taking of "public lands" for buildings, transmission, and telephone lines and tramways.

- (3) **The conditions precedent have not been complied with in these cases.**

The Utah law requires due process and compensation before the right of way may be obtained.

It is not pretended in any of these cases that the defendant has fulfilled these vital conditions.

## II.

*The State has no power to grant rights of way on the public lands or reservations.*

We are dealing here, of course, with the conception of a power inherent in the State to appropriate, or authorize others to appropriate, portions of the public domain or reservations for uses which it declares to be public. Opposing counsel argue that the power exists *ex necessitate* as an attendant upon the power to control the appropriation and use of water. But the argument does not stop there; it makes the broad claim that, quite independent of the use of water, the power extends to all uses which, in the view of the State, are requisite to her internal development. Apparently it is an eminent domain which, as applied to the United States alone, rises above the formalities of due process and compensation. In the brief filed by Utah and other States the conception is carried to its logical conclusion; the State power excludes any Federal power to grant or regulate or affix conditions to rights of way for uses which are public in character.

We scarcely need say of this conception that, granted even in its mildest form, the result would be to deprive the General Government of all ability to carry out its plan of conservation in some of its most important branches. Its ability to reserve for general disposition its valuable water-power sites on the public lands and reservations and dispose of them only for their money worth, or to permit of their use

upon conditions calculated to secure adequate rentals and avoid public evils, would vanish like a dream. The cherished policy of reclaiming the arid public lands by irrigation would become impossible. Accept the doctrine as fully expanded, and doubtless the coal and oil deposits, the timber, and other important materials on the public domain, as well as the use of lands for grazing, would pass into State control. In other words, one perceives that the results of this conception would be quite as remarkable as the conception itself.

**(1) The control and disposition of the lands of the United States are lodged exclusively in Congress.**

This proposition, in varying applications, has been repeatedly examined by this court and always decided in the affirmative. We believe it would be hard to find a principle under the Constitution which is more firmly settled or better understood. Among the cases which apply it are:

*Wilcox v. Jackson*, 13 Pet. (1839) 498, 516.

*United States v. Gratiot*, 14 Pet. (1840) 526.

*Jourdan v. Barrett*, 4 How. (1846) 168, 184.

*Irvine v. Marshall*, 20 How. (1857) 558.

*Gibson v. Chouteau*, 13 Wall. 92, 99.

*McCarthy v. Mann*, 19 Wall. 20.

*VanBrocklin v. Tennessee*, 117 U. S. 151, 167.

*United States v. Insley*, 130 U. S. 263.

*Redfield v. Parks*, 132 U. S. 239.

*Shively v. Bowlby*, 152 U. S. 1, 50, 52.

*Mann v. Tacoma Land Co.*, 153 U. S. 273, 283.

- Camfield v. United States*, 167 U. S. 518, 525.  
*United States v. Rio Grande Dam & Irrigation Co.*,  
 174 U. S. 690, 703.  
*Stearns v. Minnesota*, 179 U. S. 223, 251.  
*Gutierrez v. Land & Irrigation Co.*, 188 U. S. 545,  
 555.  
*Kansas v. Colorado*, 206 U. S. 46, 89.  
*Light v. United States*, 220 U. S. 523.  
*United States v. Grimaud*, 220 U. S. 506.  
*Hallowell v. United States*, 221 U. S. 317, 324.  
*United States v. Gratiot*, 1 McLean 454; 26 Fed.  
 Cas. 15249.  
*Turner v. Am. Baptist Union* (1852), 5 McLean 344;  
 24 Fed. Cas. 14251.  
*Seymour v. Sanders*, 3 Dillon 437; 21 Fed. Cas.  
 12690.  
*Union Mill & M. Co. v. Ferris*, 2 Sawy. 176.  
*United States v. Cleveland, etc., Cattle Co.*, 33 Fed.  
 323, 330.  
*Carroll v. Price*, 81 Fed. 137.  
*Heckman v. Sutter*, 119 Fed. 83; 128 Id. 393.  
*Shannon v. United States* (C. C. A.), 160 Fed. 870.  
*People v. Folsom*, 5 Cal. 373, 378.  
*Doran v. Central Pacific* (1864), 24 Cal. 246, 257.  
*Miller v. Little*, 47 Cal. 348, 350.  
*Vansickle v. Haines*, 7 Nev. 249, 262.  
*Fee v. Brown*, 17 Colo. 510, 519 (affirmed in 162  
 U. S. 602).  
*Waters v. Bush*, 42 Iowa 255.  
*David v. Rickabaugh*, 32 Id. 540.  
*Sorrels v. Self*, 43 Ark. 451, 452.



See—

*United States v. Utah Power and Light Co.*, 209 Fed. 554, 557.

*Utah Power and Light Co. v. United States*, 230 Fed. 328, 335.

The following quotations are inserted merely for the convenience of the court:

Speaking of the power expressly vested in Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Const., Art. IV, sec. 3), Mr. Justice Story long ago observed:

The power is not confined to the territory of the United States, but extends to "other property belonging to the United States," so that it may be applied to the due regulation of all other personal and real property rightfully belonging to the United States. And so it has been constantly understood and acted upon.

2 *Story, Const.*, par. 1325, end.

In *United States v. Gratiot*, 14 Pet. 526, 537, this court said:

The term "territory," as here used, is merely descriptive of one kind of property, and is equivalent to the word "lands." And Congress has the same power over it as over any other property belonging to the United States, and this power is vested in Congress without limitation.

In *Wilcox v. Jackson*, 13 Pet. 498, this court said (p. 516):

It has been said that the State of Illinois has a right to declare by law that a title derived from the United States, which, by their laws, is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States; and the construction of her own courts seems to give that effect to her statute. That State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens, by descent, devise, or alienation. But the property in question was a part of the public domain of the United States; Congress is invested by the Constitution with the power of disposing of and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation that in such a case as this the patent is necessary to complete the title. But in this case no patent has issued, and therefore by the laws of the United States the legal title has not passed but remains in the United States. Now, if it were competent for a State legislature to say that, notwithstanding this, the title shall be deemed to have passed, the effect of this would be not that Congress had the power of disposing of the public land and prescribing the rules and regulations concerning that disposition but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress in relation to a subject confided by the Constitution to Con-

gress only. And the practical result in this very case would be, by force of State legislation, to take from the United States their own land against their own will and against their own laws. We hold the true principle to be this, that whenever the question in any court, State or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to the State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

In *Jourdan v. Barrett*, 4 How. 168, and *Gibson v. Chouteau*, 13 Wall. 92, it was held that the title of the United States can not be affected by State laws of prescription or limitation. In the latter case the court declared (p. 99):

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it a

provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.

The following is from *Irvine v. Marshall*, 20 How. 558, 561, 563:

It can not be denied that all the lands in the Territories not appropriated by competent authority before they were acquired are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles as the Government may deem most advantageous to the public fisc, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new States and has heretofore been recognized and scrupulously respected by sovereign States within which large portions of the public lands have been comprised, and within which much of those lands is still remaining.

\* \* \* \*

The fallacy of the conclusion attempted from the first of the positions just stated consists in the supposition that the control of the United States over property admitted to be their own is dependent upon locality, as to the point within the limits of a State or Territory within which that property may be situated. But as the control, enjoyment, or disposal of that property must be exclusively in the United States, anywhere and everywhere within their own

limits, and within the powers delegated by the Constitution, no State, and much less can a Territory (yet remaining under the authority of the Federal Government), interfere with the regular, the just, and necessary powers of the latter. Another error, inherent in the same position, is seen in the supposition that the contracts of the Government with respect to subjects within its constitutional competency are also local, confined in their effect and operation strictly to the *situs* of the subjects to which they relate. The true principle applicable to the objection just noted, and by which that objection is at once obviated, we hold to be this: That within the provisions prescribed by the Constitution and by the laws enacted in accordance with the Constitution, the acts and powers of the Government are to be interpreted and applied so as to create and maintain a *system* general, equal, and beneficial as a whole. By this rule the acts and the contracts of the Government must be understood as referring to and sustaining the rights and interests of all the members of this confederacy, and as neither emanating from nor intended for the promotion of any policy peculiarly local, nor in any respect dependent upon such policy. The system adopted for the disposition of the public lands embraces the interests of all the States, and proposes the equal participation therein of all the people of all the States. This system is therefore peculiarly and exclusively the exercise of a Federal power. The theater of its accomplishment is the seat of the Federal Government. The

mode of that accomplishment, the evidences or muniments of right it bestows, are all the work of Federal functionaries alone.

If the public lands were subject to the State sovereignty, as claimed by the defendants, they would be subject, like other lands, to State taxation. But, of course, the State can not tax them (*Van Brocklin v. Tennessee*, 117 U. S. 151, 168, and many cases there cited) any more than it can sell them.

Respecting the dispositions and uses to be made of these lands Congress, to quote the Supreme Court of Colorado (*Fee v. Brown*, 17 Colo. 510, 519), "is omnipotent." "The disposal must be left to the discretion of Congress." (*United States v. Gratiot*, 14 Pet. 526, 538.) It may grant the fee; it may lease; it—

can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely. \* \* \* And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts can not compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power

of the United States as a sovereign over the property belonging to it.

*Light v. United States*, 220 U. S. 523, 536, 537.

There is nothing new in the theory of the defendants; it is but the recrudescence of an idea which, garbed in various expressions but always fundamentally the same, has been often advanced in the history of the country and invariably rejected.

A doctrine somewhat similar to this was at one time advanced, with some prospect of embodying in its favor a strong public feeling. It was, indeed, not only asserted that the laws of the United States which regulated the sale of the public lands within a State were void, but that the lands rightfully belonged to the State. This doctrine was well calculated to enlist in its behalf local feelings and interests, but the sober sense of public sentiment gave little encouragement to so novel and dangerous an error.

*United States v. Gratiot*, 1 McLean 454 (decided by Mr. Justice McLean in 1839), where it was contended that Congress could not lease a lead mine.

On the part of the complainant it was contended that on the establishment of the State government, Michigan, by virtue of her sovereignty, had a right to all the lands within her limits.

This argument is not now advanced for the first time. Several years ago it was broached in the Senate, and in some of the State legislatures, but it was received everywhere with less



favor than its advocates anticipated. It proffered so rich a boon to the new States, it was expected that they would embrace it with enthusiasm and hail its advocates as the distinguished friends of State rights. The argument grew less cogent by the lapse of time, as the public lands passed into the hands of individuals, by purchase. Had it not been for this, no one can say that the policy would not have enlisted a powerful, if not successful party in our political progress.

Looking at the matter as a question of law, we have no hesitancy in saying the argument is groundless.

*Turner v. American Baptist Union*, 5 McLean 344, decided in 1852.

See also *Van Brocklin v. Tennessee*, 117 U. S. at pp. 159 *et seq.*

The enabling act in the case of Utah contains the following:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, \* \* \* and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States. 28 Stat. 108.

The Constitution of Utah expressly adopted this provision, thus making it part of the organic law of that State. (Const. Utah, art. 3, par. 2; Comp. L., Utah, 1907, p. 45.) This and like provisions in other

States have been held to constitute, of themselves, solemn compacts that the States shall exercise no power whatever over disposition or control of the public lands within their limits. *Turner v. American Baptist Union*, 5 McLean 344; *Doran v. Central Pacific Co.*, 24 Cal. 246; *Stearns v. Minnesota*, 179 U. S. 223, 251; *United States v. Utah Power & Light Co.*, 209 Fed. 554, 558.

In considering a similar provision in *Stearns v. Minnesota*, 179 U. S. 223, Mr. Justice Brewer said (p. 250):

These provisions are not to be construed narrowly or technically, but as expressing a consent on the part of the State to the terms proposed by Congress, and among these terms were that *the full control of the disposition of the lands of the United States should be free from State action*. Whether Congress should sell or donate, what terms it should impose upon the sale or donation, what arrangements it should make for securing title to the beneficiaries—were all matters withdrawn from State interference by the terms of the enabling act and the constitution.

And again, at page 251:

But whatever may be the rule applicable in the ordinary administration of affairs in the land department, the provisions of the enabling act and the State constitution, before referred to, secure to the United States full control of the disposition of public lands within the limits of the State.

The compact, however, was not necessary to insure against State interference. *Van Brocklin v. Tennessee*, 117 U. S. 167; *South Carolina v. United States*, 199 U. S., 437, 452; *Coyle v. Smith*, 221 U. S. 559, 574, 578.

As the tenure by which the lands are held is quite independent of the State, and as the title is vested in the United States as sovereign owner (*Light v. United States*, *supra*, p. 537; *Camfield v. United States*, 167 U. S. 518, 525; *United States v. Cleveland and Colorado Cattle Co.*, per Brewer, J., 33 Fed. 323, 330), in trust for all the people, attended by a constitutional grant of disposing and controlling power, given in express terms without any limitation, it is impossible to conceive of this property as being subject, while it remains in the United States, to the laws of another and inferior sovereign.

**(2) Observations on the claim that State equality and State preservation demand a State power to appropriate Federal lands.**

In substance this claim is identical with the claim made by the appellant (represented by the Attorney General of Colorado) in the *Light* case, *supra*, viz: That the forest reserve policy was unconstitutional because of its effects upon the State tax revenue and the opportunities for developing the resources within her limits. The argument was based upon the same false theory of State equality as we have in these cases and largely upon the same supposed authorities.

The fallacy results first from a failure to understand that the powers of a State are not such as

would inhere in an independent sovereignty, but only such as remain after deducting all the express and implied powers which the people granted to the General Government; and secondly, from confounding the existence of power with the opportunity to exercise it.

The national property is excepted from the power of all States alike.

All the property and all the institutions of the United States are constructively without the local, territorial jurisdiction of the individual States in every respect, and for every purpose, including that of taxation.

*McCulloch v. Maryland*, 4 Wheat, 316, 395.

"We take it to be a point settled beyond all contradiction or question that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign Governments, with their houses and effects, and property belonging to or in the use of the Government of the United States. *Coe v. Errol*, 116 U. S. 517, 524."

*Van Brocklin v. Tennessee*, 117 U. S. 151, 178.

Viewed as property, the public domain is strictly national. (*Irvine v. Marshall*, *supra*.) While there are references in some opinions to the holding of property by the United States in a "private capacity," or as an "ordinary proprietor" (see *Ft. Leavenworth Co. v. Lowe*, 114 U. S. 525, 526; *Ward v. Race Horse*, 163 U. S. 504, 514; *Chicago, R. I. & P. Ry. Co. v. McGlinn*, 114 U. S. 542, 547), these were

merely convenient expressions to distinguish the general mass from property over which the Government has exclusive jurisdiction or property devoted to strictly governmental purposes. Properly speaking, the United States does not ever hold property in a private capacity, but always for public objects. (*Van Brocklin v. Tennessee*, 117 U. S. 161.) It has been repeatedly held by this court that the public lands (and, of course, the forest reservations) are held in trust for the benefit of all the people. *Light v. United States*, 220 U. S. 523, 537; *Causey v. United States*, 240 U. S. 399, 402. The circumstance that public lands are situate within a particular State can not give to that State or its people any greater power over them or interest in them as property than is shared by all the States and people of the country.

The fact that there is more national property in one State than another does not create an inequality of sovereignty as between the two States.

Each State has the power to tax all property, real or personal, situate within her boundaries, except the property, real or personal, of the United States or of foreign diplomats. Necessarily there is more Federal property in some States than in others, and its proportion to all other property in one State may be greater than in another. Will it be asserted that to avoid sovereign inequality, the first State must be permitted to tax Federal property?

If the sovereignty of a State is diminished by its inability to appropriate public lands to suit its public policies, in the same or greater degree must it be

diminished by its inability to tax those lands. The same argument which is urged in support of the power of condemnation or appropriation would support the power to tax, and likewise the power to regulate and affix conditions to the tenure of the Government's grantees.

Though the Constitution intends that the State as well as the National Governments shall be independent and autonomous within their respective spheres (*McCulloch v. Maryland*, 4 Wheat. 316; *Texas v. White*, 7 Wall. 700; *Collector v. Day*, 11 Wall. 118), it is "no longer debatable" that "a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself." (*South Carolina v. United States*, 199 U. S. 437.) The enumerated power "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States" is a power granted without express limitation.

There is a wide difference between admitting the sway of the State's general police power in those parts of her jurisdiction which are occupied by the public lands and admitting her power to appropriate the lands themselves. In the one case the lands are related to the power merely as the locus of its exercise; they are not its object, nor are they or the rights and privileges of their owner, affected by it in any way. The lands (when not excepted in the act of admission) are territorially a part of the State jurisdiction, and to say that, territorially, the police

power was not coextensive with the jurisdiction would be a contradiction in terms.

In the other case, *per contra*, the power, if exerted at all, must operate directly on the lands, deprive the United States of its title to them, and frustrate any plan it may have adopted respecting their retention or use. It thus inevitably collides with the Federal proprietary right and constitutional function. Its exercise *quoad* such lands is not necessary to the existence of the State or to the existence and play of a municipal jurisdiction complete (in every other respect) over the entire region in which they are situated. To deny the right to take such lands while they remain Federal property is not to deny the State's power of eminent domain, but merely to limit, in favor of the superior right of the United States, the things upon which it may operate. In refusing to dispose of the land or to permit the State to do so, Congress is not destroying any necessary function of the State government. Practically Congress could not work such a result in that purely passive or negative way.

It is not necessary, therefore, to curtail or subordinate the proprietary rights of the United States in order to preserve the equality of any State or her power of eminent domain. Immunity of the United States, complete though it be, still leaves the State full liberty to exert that power on all her proper subjects. On the other hand, once concede that the power to appropriate for public uses extends to the property of the United States, and the control sup-



posed to be vested in Congress by express grant of the Constitution is in large measure destroyed by a mere implication; the discretion and judgment of Congress go down in a contest with the judgment and discretion of the State legislature. For, in view of modern developments and modern decisions, he would be rash indeed who would venture to predict the limits of the legislative power to declare uses public. The expediency of exercising this far-reaching power, the need of any particular taking, and the estate or interest to be appropriated are all matters for the legislature exclusively. It may determine the procedure, so it provide due process and compensation; it may exercise the power directly or confer it on whosoever it pleases.

The appropriation by the State of all that she and her delegates could lay hands on by employing this power in a lavish process of internal development, would be diametrically opposed to the policy of Congress as evinced by numerous withdrawals of power sites and other kinds of land, by the forest legislation, and by the later permit and right of way acts already discussed in this brief. According to decisions of this court which we have cited, the policy of Congress is supported by the express grant of power enumerated in the Constitution. An opposite policy of the State could only be supported by resorting to the general mass of State governmental powers which, as pointed out in the case of *South Carolina v. United States*, cited above, would be practically unlimited but for the Constitution, and by assuming

that every exercise of the State power of eminent domain which the legislature may choose to authorize, is a power essential to the preservation of the government and governmental function of the State. Thus the power expressly granted to Congress would be done away by a false implication.

The very purpose of the people in granting the express power was to insure that the disposition, control, and management of the common estate should be vested in the legislature of the common government. As was said in *McCulloch v. Maryland* (p. 431):

Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.

"In other words," said this court in the case of *South Carolina*, supra (p. 456), "we are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State."

This fundamental principle does away completely with the idea that the public lands, or any other property of the United States, can be treated by a State as private property:

The Constitution vests in Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise.

*Wisconsin R. R. Co. v. Price County*, 133 U. S. 496, 504.

*United States v. Insley*, 130 U. S. 263, 265.

*Same v. Nashville, etc., Ry. Co.*, 118 U. S. 120, 126.

The cases cited (and many others) establish the immunity of the United States from taxation of its property and from the effects of laches and State statutes of limitation when it seeks to protect its property by litigation. If it holds the bare legal title, the property is taxable; and if it brings the suit in the interest of a private person, both laches and limitation may apply. (See *United States v. Beebe*, 127 U. S. 338.) If it has a substantial interest in the property or the subject of litigation, that fact alone suffices to stamp both with the public character, which in turn suffuses each with the immunities of sovereignty.

The brief of the *Utah Power & Light Company*, p. 35, attempts to distinguish the case of taxation from the case of taking by eminent domain upon two

grounds: First, it is said the power to tax is the power to destroy, because it returns no equivalent for what it takes, whereas the power of eminent domain, by returning an exact equivalent, leaves the owner as well off as he was before his property was taken; second, the power to tax may be waived or contracted away as to specific property, but the power to condemn can not be waived or contracted away, because that would be to affect the political rights and obligations of the State and prevent the State "from carrying out its obligation to guard and promote the interests of the public." Further, it is said (*ib.*, p. 35) that the inability to tax Federal land is not a substantial impairment of the sovereign powers of the State, because the State can collect what money it needs from others than the United States, whereas an inability to take Federal land for public purposes would be a serious impairment of sovereign powers, presumably because the particular plan which called for the taking could not be accomplished in any other way unless Congress consented.

This argument adopts the exploded notion that the interest of the United States in the public lands is private in character and not "governmental." The argument concedes that if the interest were governmental, the State could not affect it by eminent domain any more than by taxation. But if it is the private nature of the interest which subjects the lands to the former power, why does it not also subject them to the latter? The State might tax and take all the public lands without interfering with the

existence or impairing the governmental functions of the United States—if we concede that the function of managing and disposing of the public land is not governmental. We fear that this reasoning involves several false assumptions, and amounts after all to a mere play upon words. It is not correct to say that the right to tax public lands would be less important than the right to take them for public purposes. The relative importance of the two would depend entirely on circumstances. It may or may not be true that the power to tax may be waived and the power to take may not; but both are powers strictly governmental, and the former is quite as vital as the latter, and probably more so. Again, is it true that the State, if she could take public land, must return an equivalent in value in the absence of any compelling provision of her own constitution? (*cf. United States v. Jones*, 109 U. S. 513, 518; *Lewis on Eminent Domain* [3d ed.], secs. 10–12). Would the compensation depend upon the applicability of the Fourteenth Amendment for the protection of the United States? (*Chicago &c. R. Co. v. Chicago*, 166 U. S. 226, 247.) Assuming the State must compensate, how would the courts estimate the compensation for impairment or destruction of a policy of Congress? This brings us to the incurable weakness of the defendant's position. It depends upon a mere name. The function of managing the national estate may not be "governmental" in the narrow sense, but it is a function and duty of the United States Government expressly created by the Constitution, and necessarily must prevail

over any inconsistent exercise of any function of a State, whether "governmental" or not.

The power claimed for the State would be absolutely incompatible with the power of Congress. The policy of the State might, and in all probability would, differ radically from the policy of Congress respecting the use of the land and its resources. Intolerable conflict and confusion would result. The subject matter is not such as to admit of a divided control. "Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both." (*Kennedy v. Becker*, 241 U. S. 556.) If the States have the power claimed, the powers of Congress are limited to mere holding and selling, and the decisions of this court to the contrary are all wrong.

Some reliance appears to be placed upon the doctrine that the beds and shores of navigable waters must go to the States in avoidance of State inequality. This doctrine is too well understood to require lengthy discussion. See *Shively v. Bowlby*, 152 U. S. 1, 15, 48, where its origin and limitations are explained with great care. Because of the public importance of navigation and fishery, navigable waters were *publici juris* at common law. The lands, being inseparable from the waters, were necessarily affected by the public interest also. The title, *jus privatum*, was in the Crown; the dominion, *jus publicum*, was also vested in the sovereign, as the representative of the Nation and for the public benefit. The title to the land was thus one of the royalties or

sovereign rights which passed to the original States as an incident of sovereignty when they separated from England. (*Ib.* 46, 48; *Hardin v. Jordan*, 140 U. S. 371, 381.) Where there were no States, the United States held this particular class of property in trust for States to be created, and the trust was executed automatically as the new States came.

What has this to do with the right of a State to appropriate public lands in the Rocky Mountains? In some of the opposing briefs it is suggested that because of the exclusive State power over nonnavigable streams (which is assumed), all the lands which may be reached with conduits from those streams are affected with a sovereign State interest like the interest in the beds and shores of waters that are navigable. This is a curious analogy. We find no historic basis for it. Nonnavigable water is usually treated as an incident to the land along its shores. It was so at common law; it was so in all the original States. This analogy turns the tables completely. The theory apparently is that whenever the ownership or control of a thing is in the State, all other property rights which may be convenient for the use or control of that thing must go with it.

(3) Discussion of *United States v. Railroad Bridge Company* and of dicta in *United States v. Chicago*.

In *United States v. Railroad Bridge Co.* (1855), 6 McLean 517, the Circuit Court, Mr. Justice McLean presiding, held that a railroad right of way, with materials for construction, might be taken from



public land of the United States by a corporation of Illinois authorized to exercise the State power of eminent domain. The learned justice was of the opinion that the State, in the discharge of the ordinary functions of her sovereignty, could provide for such easements as might seem desirable to the legislature, in its discretion, for the promotion of intercourse between her citizens; that this power extended as well over lands owned by the United States as lands owned by individuals; and that, by fair implication, if the State had not restrained herself by compact, her power of taxation also would extend to both kinds of land without distinction (*loc. cit.* pp. 533, 534). He made an exception of lands reserved or held by the General Government for specific national purposes, such as "sites for its forts, arsenals, and other public buildings," but, as for the public land generally, he said (p. 534):

It is difficult to perceive on what principle the mere ownership of land by the General Government within a State should prohibit the exercise of the sovereign power of the State in so important a matter as the easements named. In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it. They encourage population, and increase the value of land. In no respect is the exercise of this power by the State inconsistent with a fair construction of the constitutional power of Congress over the public lands. It does not interfere with the disposition of the lands, and instead of lessening enhances their value.

He added (p. 535):

The right of eminent domain appertains to a State sovereignty, and it is exercised free from the restraints of the Federal Constitution. The property of individuals is subject to this right, and no reason is perceived why the aggregate property, in a State, of the individuals of the Union, should not also be subject to it. The principle is the same, and the beneficial result to the proprietors is the same, in proportion to their interests. These easements have their source in State power and do not belong to Federal action. They are necessary for the public at large, and essential to the interests of the people of the State.

This decision was cited with approval in an incidental way in *Union Pacific v. B. & M. R. Co.*, 3 Fed. 106; *Illinois Central v. C. B. & N. R. Co.*, 26 Fed. 477; *Union Pacific v. Leavenworth &c. R. Co.*, 29 Fed. 728; and *Jones v. Florida &c. Co.*, 41 Fed. 70. Inspection of the opinions in these cases will show that in none of them was the question involved. The first three had to do with the right of one railway company to build across or upon the right of way of another and therein to exercise the power of eminent domain. The property in question was held to be of the condemnnee companies and not of the United States. In that connection see *Railroad Co. v. Peniston*, 18 Wall. 5; *Northern Pacific v. Townsend*, 190 U. S. 267; and *C. B. & Q. R. Co. v. Chicago*, 166 U. S. 226. In the case in 41st Federal the railroad had assumed to

build on the inchoate entry of a homesteader without his consent. District Judge Locke was of the opinion that this was unlawful, but that the company could ultimately obtain a right under the condemnation laws of the State, citing the case in 6th McLean. Apparently he was not aware of the general railway act of March 3, 1875 (18 Stat. 482), which expressly provides for granting rights to railroads over public lands and the means for acquiring possessory rights of settlers through condemnation proceedings.

In *United States v. Chicago*, 7 How. 185, it was held that the State power (exercised by the city) could not extend to the taking for street purposes of land within a Federal reservation. The opinion contains a dictum by Mr. Justice Woodbury to the effect that if the lands had not been reserved they could have been taken. More recently, however, by a decision of this court, in a case of great authority, in which the property rights of the General Government were considered with exhaustive care in the light of the development of the law applicable to the subject, the holding of Mr. Justice McLean and the dictum of Mr. Justice Woodbury were practically repudiated. We refer to the case of *Van Brocklin v. Tennessee*, 117 U. S. 151, 161, in which this court said, speaking first of the *Bridge Company's* case:

The question in issue in that case was not of the State's right of taxation, but of its right of eminent domain for the construction of roads and bridges. The decision of the learned justice in favor of the validity of the exercise of that right by a State over lands of the United

States, without the consent of the United States, manifested either by an express act of Congress or by the assent of a department or officer vested by law with the power of disposing of lands of the United States, appears to have been based upon the theory that the United States can hold land as a private proprietor, for other than public objects, and upon a presumption of the acquiescence of Congress in the State's exercise of the power as tending to increase the value of the lands; and it finds some support in dicta of Mr. Justice Woodbury, in a case in which, however, the exercise of the power by the State was adjudged to be unlawful. *United States v. Chicago*, 7 How. 185, 194, 195. But it can hardly be reconciled with the views expressed by Congress, in acts concerning particular railroads too numerous to be cited, as well as in general legislation. Acts of August 4, 1852, ch. 80, and March 3, 1855, ch. 200, 10 Stats. 28, 683; July 26, 1866, ch. 262, §8, 14 Stat. 253; Rev. Stat. § 2477. When that question shall be brought into judgment here, it will require and will receive the careful consideration of the court.

The *Railroad Bridge Company's* case in another aspect was again considered in *Luxton v. North River Bridge Co.*, 153 U. S. 525, 531, where, after quoting remarks in Mr. Justice McLean's opinion denying the power of Congress to construct bridges, railways, or turnpikes, this court said:

The same learned justice repeated and enlarged upon that idea in his dissenting opinion

in *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, 442, 443 \* \* \*. But the majority of this court in that case held that "the act of Congress afforded full authority to the defendants to reconstruct the bridge."

In 1855, when *United States v. Railroad Bridge Company* was decided, there had been but little occasion for the extension of railroads over the great stretches of the public domain. The policy up to that time in respect of the public lands had been practically confined to the policy of selling them for money. The necessity for the ordinary ways of communication was supplied by the sale, donation, or condemnation of private land or (as the opinion in that case shows) by the appropriation of public land with the tacit acquiescence of the Government. Beginning, however, in 1852 (see acts cited in *Van Brocklin v. Tennessee*, 117 U. S. at p. 162) and thence progressively Congress provided by special and general laws for railway communication everywhere throughout the States and Territories where public lands existed. Its liberality in that regard met every possible requirement. By the act of 1866, as we have seen, it permitted the local governments and communities to lay out highways wherever they saw fit (R. S., sec. 2477; see, also, the forest reserve act of 1897, discussed *supra*); and now all the means which could possibly be needed in any public-land State for access, for transportation, for the conduction and use of water and electricity are made available by the Federal legislation. If more is really required for the

welfare of the States, doubtless Congress will be disposed to grant it upon petition of the State legislatures.

As was said by Mr. Justice Brewer in *Stearns v. Minnesota*, 179 U. S. (p. 242):

It is true that Congress might act so in effect as to keep withdrawn a large area of the State from taxation. Under the reservation in the act of admission and the acceptance thereof by the State of Minnesota the right of Congress to determine the disposition of public lands within that State was reserved, and, according to the decision in *Van Brocklin v. State of Tennessee*, *infra*, lands belonging to the United States are exempt from taxation by the State. So that if Congress should determine that the great body of public lands within the State of Minnesota should be reserved from sale for an indefinite period it might do so, and thus the lands be exempted from taxation; and yet it can not be imputed to Congress that it would discriminate against the State of Minnesota or pass any legislation detrimental to its interests. It had the power to withdraw all the public lands in Minnesota, from private entry or public grant, and, exercising that power, it might prevent the State of Minnesota from taxing a large area of its lands, but no such possibility of wrong conduct on the part of Congress can enter into the consideration of this question. It is to be expected that it will deal with Minnesota as with other States, and in such a way as to subserve the best interests of the people of that State. That a power may be injuriously exercised is no reason for a mis-

construction of the scope and extent of that power. So the fact that Congress might, if it saw fit, withdraw the public lands in Minnesota from sale, and thus prevent their taxation, furnishes no reason for denying the efficacy of the power to grant such lands, subject to conditions binding upon the State, or the right of the State, as its trustee, to prescribe limitations upon taxation.

Mr. Justice McLean, when he wrote the opinion in the *Railroad Bridge Company's* case, had prominently in mind the relation of access to the pecuniary value of the land. The policy of Congress in that day was to sell all the public land for the best prices obtainable. It would be hardly fair to his opinion to assume that he could have foreseen the necessity of the Federal policy of conservation which is now an actuality, or the enormous extension of the State power to the appropriation of private property for every conceivable public purpose. The case arose when conditions were comparatively simple and the State power was thought of as a help rather than a hinderance to the then policy of Congress. We respectfully submit, however, that there are certain very serious errors in the statements made. It is eminently incorrect to say that the State power "is exercised free from the restraints of the Federal Constitution." Neither does it follow, because "the property of individuals is subject to this right," that no reason is perceivable "why the aggregate property, in a State, of the individuals of the Union, should not also be subject to it." We respectfully submit that



to hold that "the principle is the same" is to overlook entirely the reason stated by Chief Justice Marshall in *McCulloch v. Maryland*, and restated by Mr. Justice Brewer in *South Carolina v. United States*, why interests that are National can not safely be subjected to State power. It is to overlook, too, the cardinal idea in our Government of Federal supremacy in Federal affairs.

If any one proposition could command the universal assent of mankind we might expect it would be this—that the Government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the Government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The Nation, on those subjects on which it can act, must necessarily bind its component parts. \* \* \*

It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

*McCulloch v. Maryland*, 4 Wheat. 315, 405, 427.

Eminent domain rests on the relation of sovereign and subject, superiority and inferiority. It proceeds *in invitum*. It takes by process of law. But, though the United States may sue a State (*United States v. Texas*, 143 U. S. 621)—

It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.

*Kansas v. United States*, 204 U. S. 331, 342.

The United States can be sued only in such cases and in such courts as are permitted by its own laws. Therefore the provision of subdivision 3, section 1240, of the Code of Civil Procedure, by which the State declares that the lands "owned or held by the United States in trust or otherwise" may be subjected to proceedings in eminent domain, stands upon our statute books without the slightest efficacy until the United States Government itself shall have authorized the States to bring itself and its lands into their courts.

*Deseret Water &c. Co. v. California*, 167 Cal. 147, 158.

To obviate this difficulty, opposing counsel say that no condemnation suit is necessary. The land may be simply appropriated and enjoyed, and compensation may be adjusted when the Government claims it. (See brief of Utah Power & Light Co., p. 39.) This is but "whipping the devil around the stump." It ignores the fact that the reasons for the immunity from the taking and the immunity from suit are the same.

## III.

*The proposition that the United States has lost all interest in and power to appropriate and use the surplus water in the public-land States is emphatically denied. In spite of its great importance it will not be argued at length, because in these cases it is deemed to be entirely irrelevant.*

If one were to admit that the entire power to dispose of water has somehow passed to the States, the admission would be without consequence to these controversies, because it would be wholly unreasonable to infer from such a power an equal or higher power to dispose of public land.

The States possess a governmental power which enables them, in some undefined degree consistent with the Fourteenth Amendment, to control and regulate the appropriation and use of water by their citizens and inhabitants. They have doubtless a similar power respecting the land within their boundaries, so it be not land of the United States. It is a species of police power, not based on the property idea but upon the necessity of a governmental control over all persons and things for the protection of the general welfare. The United States, on the other hand, must be deemed to have held a property interest in the waters flowing on its lands when the States were created; and if so, when and how was that interest lost?

The logical doctrine is that, after as before statehood, the surplus waters are part and parcel of the public domain, held by the same title and subject to

the same disposition as the public land. The decisions of the Pacific Coast States accept this doctrine and trace title to water rights to the United States as well as title to land.

See 1 *Wiel on Water Rights* (3d ed.), sec. 151 *et seq.*;

2 *Kinney on Irrigation and Water Rights* (2d ed.), sec. 627 *et seq.*

*Kansas v. Colorado*, 206 U. S. 46, is not an authority to the contrary. The Government there sought to maintain its intervention upon the broad theory that because the policies of Colorado and Kansas respecting the use of the waters of the Arkansas were conflicting, and because neither State was competent to regulate that use outside of her own borders, the entire power of regulation must be held to reside in the United States. Such a Federal power was said to be essential to insure the reclamation of arid lands—not lands of the United States alone, but arid lands generally. This was claimed as an inherent power of sovereignty—a sort of national police power springing from the needs of the situation. The opinion, of course, concedes the power of the United States to control the disposition of its public domain. Its interest in the use of water upon its own lands or for the advantageous reclamation, use, and disposition of its own lands, was not in issue.

Mr. Kinney, in the work cited above, after a lengthy examination of the subject, comes to the conclusion (sec. 640) that while each State may determine whether she will adopt the law of riparian rights or the law of appropriation, the ownership in or the

right to make use of water on the public lands comes not from the State, but from the United States. He finds that the acts of Congress, the decisions of the courts of California, Oregon, Washington, and other States, and the decisions of this court, all tend to support his conclusion.

See *Sturr v. Beck*, 133 U. S. 541;

*Winters v. United States*, 207 U. S. 564;

*United States v. Rio Grande Dam Co.*, 174 U. S. 690;

*Gutierrez v. Land Co.*, 188 U. S. 545.

*Burley v. United States* (CCA), 179 Fed. 1, 12.

*Jennison v. Kirk*, 98 U. S. 453, and other cases which we cited in discussing the act of 1866, all seem to have proceeded upon the theory that the water rights as well as the rights of way are derived from the United States.

See also *Benton v. Johncox*, 17 Wash. 277;

*Howell v. Johnson*, 89 Fed. 556;

*Morris v. Bean*, 146 Fed. 432; 159 Fed. 652; 221 U. S. 485;

*Anderson v. Bassman*, 140 Fed. 14.

The view expressed by Mr. Kinney, in so far as it defines the property interests of the United States, is believed to be entirely sound, and its soundness demonstrable by the acts of Congress and the decisions of this and other courts.

If this court should hold that the United States has no property interest in the unappropriated waters, it might be difficult to devise a theory to prevent the States from paralyzing the efforts of the Government to reclaim and develop the public

domain; for by what principle would the States be enjoined from denying the right of appropriation altogether in the case of the United States? If the disposing power is wholly in the State governments, the water, as the Colorado constitution declares (Utah brief, p. 69), is "the property of the public \* \* \* dedicated to the use of the people" of the States where the waters are found, just as the public lands are, in the ultimate analysis, the property of all of the people of the Nation. If this be a correct proposition, the United States as a Government, or as trustee for all the people, has no property interest in these waters and no power to use them or authorize their use if the States forbid. The attitude of the executive branch upon this subject is thus expressed by the Attorney General in his 1914 report, page 39:

The department takes the position that in the arid and semiarid regions, where the legality of diverting and appropriating water for beneficial uses on nonriparian lands is generally established, the original right of the Government to appropriate surplus water for its own uses, particularly for the reclamation of its enormous holdings of arid lands, has not been surrendered by any act of Congress or divested by the mere creation of the States into which those regions have now become incorporated. This position has been sustained by one of the district courts of the State of Colorado. Its soundness has been challenged by certain claimants who would have the Federal user dependent on the permission of State laws.

The question is at present theoretical rather than practical, and probably will remain so as long as the cooperative policies of the State and National Governments continue as they are. In view of its potential importance, however, the question will demand most exhaustive argument whenever it comes to be properly presented. We shall content ourselves with the foregoing observations concerning it.

#### PART THIRD.

*The Government is not estopped to enforce the law in these cases.*

It has been so often decided that the title of the United States is not to be divested without the consent of Congress that citations in that behalf would be superfluous. The proposition is axiomatic. The directions of the dispositive acts must be pursued.

*Rector v. Ashley*, 6 Wall. 142, 151.

*Frisbie v. Whitney*, 9 Wall. 187, 194.

*Emblen v. Land Co.*, 184 U. S. 660.

It is equally well settled that the laches, neglect, or affirmative acts of executive officers, not themselves supplied with power over the subject through an act of Congress, will not avail to estop the Government from asserting the proprietary or other rights of the United States.

See *United States v. Kirkpatrick*, 9 Wheat. 735.

*Gibson v. Chouteau*, 13 Wall. 92.

*Frisbie v. Whitney*, 9 Wall. 187.

*United States v. Insley*, 130 U. S. 263.

*United States v. Beebe*, 127 U. S. 338.



Consequently, the occupancy of public lands, no matter how long continued, and the making of improvements thereon, no matter how extensive, can confer no rights against the Government.

*Sparks v. Pierce*, 115 U. S. 408.

*Frisbie v. Whitney*, 9 Wall. 187.

*Drew v. Valentine*, 18 Fed. 712.

*Russian-American Co. v. United States*, 199 U. S. 570.

*Lake Superior, etc., Co. v. Cunningham*, 155 U. S. 354.

*United States v. Trinidad Coal & Coking Co.*, 137 U. S. 160.

If it be possible for the Government to lose its property through estoppel, the result could only flow from some action of Congress itself as suggested in *United States v. Willamette &c. Wagon Road Co.*, 54 Fed. 807, 811. It is true that, under exceptional circumstances, rights may vest through acquiescence (*Broder v. Water Co.*, 101 U. S. 274), but only when the acquiescence is that of Congress

Read, as the several answers must be, without indulging looseness and without ignoring the data of judicial knowledge, no ground is presented for an estoppel. Congress had declared the terms upon which hydroelectric enterprises might be allowed on the lands in controversy. If any of the defendants was misled, the fault is not attributable to Congress.

Although the inquiry is immaterial, it is difficult to perceive wherein the defendants were misled by Executive action. The Interior Department seems con-

sistently to have held out the acts of 1896 and 1901 as controlling in such cases. It is not shown that a contrary interpretation was placed upon either. As for the "agreement" mentioned in one of the answers, it amounted at most to an honest but very evidently erroneous understanding concerning the right-of-way law of 1905.

The delay of the litigation has not harmed the defendants. (It may have been due to their own application, based on the possibility of obtaining amendatory legislation.) The only conceivable foundation for an estoppel seems to be that the executive officials were not more diligent in protesting against the construction of the works.

*Roberts v. Northern Pacific*, 158 U. S. 1, and similar cases cited by defendants, are cases in which the private owner has been denied injunctive relief because, though the railroad or other improvement came upon his land without his consent, there still was, before it came, an opportunity for him to object, of which he did not avail himself. It is estoppel made extreme because of public interests. Such cases can have no application here. The private owner has full power to consent; and the public-service corporation or municipality, having the right to condemn, if necessary, has a right to assume consent in the absence of express objection. In the case of the public lands and reservations, the Constitution and the acts of Congress are a standing objection to any appropriation not made in the manner and subject to the

conditions which the law provides. The consent can not be assumed; nor is anyone authorized to give it in the absence of permission from Congress. It would be absurd and contrary to all the authorities on the subject to say that by the mere inaction, or even by the express allowance, of an administrative officer the United States could be deprived of its land by an estoppel, in violation of an express policy of Congress.

The word "confiscation" is liberally used in the briefs of defendants in the effort to arouse judicial sympathy and class these cases with others in which private landowners, by ejectment or injunction, have sought to oust intruding railroad companies, etc., and strip them of valuable improvements. But in these cases the defendants may acquire a lawful status and save all their property by complying with the law which they have thus far evaded.

If, after obtaining permits under the act of 1901, and easements (for transmission and telephone lines) under the act of 1911, they find themselves afflicted by unlawful charges and regulations, their remedy is to disregard them. *United States v. Andrews*, 240 U. S. 90 (Feb. 21, 1916).

It is not to be apprehended that the permits will be arbitrarily denied or revoked. This court has said that in our Government there is no place for arbitrary power. *Garfield v. Goldsby*, 211 U. S. 249.

## PART FOURTH.

*The cross appeals.*

The Government was entitled to an accounting.

The bills (see Cause 204, R. 6) pray an accounting for "the reasonable value" of the enjoyment of the various works and buildings *on the reserved lands of the United States*, "to be gauged by the duration of such enjoyment, the net power capacity of said works and the scale of charges adopted by the Secretary of the Department of Agriculture governing similar cases."

The right to this relief is fully sustained by *United States v. Utah Power & Light Co.*, 230 Fed. 328, 342.

The regulations provide:

Reg. L-8. The occupancy and use of National Forest lands (otherwise than by transmission lines) under a preliminary or final power permit for power sites of more than 100-horsepower total capacity (except permits to municipal corporations for municipal purposes, or for irrigation, or for temporary construction of project works as in this regulation hereafter specified) will be conditioned on the payment in advance for each calendar year of a rental charge calculated from the "rental capacity of the power site," as defined in Regulation L-7, at the following rates per horsepower per year, unless otherwise ordered by the Secretary.

For the unexpired portion of the calendar year and for the first full calendar year of the survey-construction period, and similarly for the operation period.....	\$0.10
For the second full calendar year of each of said periods..	.20
For the third year.....	.30
For the fourth year.....	.40
For the fifth year.....	.50
For the sixth year.....	.60
For the seventh year.....	.70
For the eighth year.....	.80
For the ninth year.....	.90
For the tenth and each succeeding year.....	1.00

The occupancy and use of National Forest lands by transmission lines, except only where such lines are owned and operated by a municipal corporation for municipal purposes, or are part of a power project under permit, or are to be used temporarily in the construction of project works under permit issued to the same permittee, will be conditioned on the payment in advance for each calendar year of a rental charge of five dollars (\$5) for each mile or fraction thereof, unless otherwise ordered by the Secretary.

R. No. 204, p. 69.

"Rental capacity," upon which these charges are to be collected, is defined as follows:

"Rental capacity of the power site" means the capacity on which the rental charges are based. Unless otherwise ordered by the Secretary, it will be determined by making the following deductions from the total capacity of the power site.

(a) Whenever power projects include water-conduit sites not wholly on National Forest lands a deduction will be made from that part of the total capacity of the power site which is due to the use of the nominal stream flow. This deduction will be, in per cent, the sum of

(1) the product of the proportion of the average effective head obtained from the dam by the per cent of submerged lands below the flow line fixed by the average effective head that are not National Forest lands, and (2) the product of the proportion of the average effective head obtained from the water conduit (from intake to tail-race outlet) by the per cent of the length of said conduit which is not located on National Forest lands.

(b) Whenever power projects include reservoir sites not wholly on National Forest lands a deduction will be made from that part of the total capacity of the power site which is due to the use of stream flow made available from storage by the project works. This deduction will be the per cent of the total area of the reservoir sites that is not National Forest land.

(c) From the total capacity of the power site which remains after deductions (a) and (b) have been made will be made a further deduction which, in per cent, shall be the product of the square of the distance of primary transmission in miles and the factor of 0.001, but in no case shall deduction (c) exceed 25 per cent.

*Id.*, p. 68.

Other explanatory definitions are given in the regulations (*Id.*, pp. 67, 68). It thus appears that where a plant is partly on private land, the annual charges per horsepower are based on a scientific calculation of the amount of power derivable from the water supply and head assignable to the land owned by the Government. The answers aver baldly that the

charges are "unreasonable and unlawful," seeming to mean that they are unreasonable because unlawful. There is nothing specific stated in the answers or discernible in the regulations to warrant a conclusion that they are unreasonable in fact, and the presumptions, of course, are all in their favor.

The trial court did not make known on the record why the prayer for damages was denied. It seems clear that the Government was entitled to recover the "worth of the use of the property" during the trespass.

*United States v. Bernard* (C. C. A.), 202 Fed. 728, 729.

If the charges fixed in the forest regulations are reasonable, they measure the damage precisely as the law would measure it without their aid. If they are too high, or would be too high, in any of the cases, if applied from the commencement of the trespass, some other means of measurement could be adopted consistently with the prayers of the bills.

The Secretary had a right to fix these charges.

*United States v. Grimaud*, 220 U. S. 506.

*Swigart v. Baker*, 229 U. S. 187.

In 26 Op., 421, 425, the Attorney General construed the statutes as giving the power to make charges for the use of rights of ways under the act of 1901:

\* \* \* If, however, the act of 1897 conferred upon the Secretary of the Interior, and, therefore, afterwards upon the Secretary of Agriculture, the authority in his discretion to



require payment of a reasonable charge as a condition of issuing any such permits as are authorized by the said act, it seems to me quite clear that the act of 1901, above quoted, conveys the like authority. The language of the later act appears to me more explicit than that of the former, and the intention of the Congress to leave the privileges granted under that act revocable in the discretion of the Secretary, as is expressly stated in the last proviso, above quoted, of the act of 1901, seems to be more nearly consonant with a purpose to intrust to his discretion all matters connected with the granting of such permits than is any relevant provision to be found in the act of 1897. I conclude, therefore, that you are authorized by the act of 1901 to make the granting of permits for the purposes contemplated by that act dependent upon the payment by the persons receiving such permits of such charges as you may deem reasonable for the purposes contemplated by the law.

Whether charges based upon the three grounds specifically enumerated in your letter requesting an opinion, would or would not be reasonable, is not, under the circumstances of this case, a question proper to be determined by this department, but a matter left by the law entirely to your discretion. In *Riverside Oil Company v. Hitchcock* (190 U. S. 325), referred to in the opinion of Attorney General Moody, above quoted, the court says: "The responsibility as well as the power rests with the Secretary, uncontrolled by the courts." This would seem to be no less true as to the question presented in the present case.

In *St. Louis v. Western Union Tel. Company*, 149 U. S. 465, 469, Mr. Justice Brewer, in speaking of the power of the city to regulate its streets, said:

It is given power to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word "regulate" is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the city and then limit the use to vehicles of a certain kind or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street on condition of contributing something towards the expense it has been to in opening and improving the street.

And again (p. 471):

\* \* \* what the company shall pay to the city for the use is directly involved in a regulation of the use. The determination of the amount to be paid for the use is as much

a matter of regulation as determining the place which may be used or the size or height of the poles. The very argument made by the court to show that fixing telephone charges is not a regulation of the use is persuasive that fixing a price for the use is such a regulation.

As for the intention of Congress, the court is respectfully referred to the act of February 1, 1905 (33 Stat. 628), referred to by Mr. Justice Lamar in the Grimaud case, providing that all money received from the sale of products or *the use of any land or resources of said forest reserves* shall be covered into the Treasury. The act further provides that such money shall, for a period of five years from the passage of the act, constitute a special fund for the protection, administration, improvement, and extension of forest reserves.

As to whether the fee should be based upon the amount of horsepower developed or upon the market value of the land, or otherwise, the question is plainly one for the disposing power and not for the courts.

When a function of that kind is assigned by Congress to an administrative officer his conclusions are not reexaminable by the courts, except for extraordinary reasons not apparent in these cases. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316.

These charges, therefore, are to be treated as though they had been fixed by Congress. It may be said to be the policy of Congress that the use should be paid for at the rates thus prescribed. This furnishes an additional reason why the court below

should have awarded the accounting as prayed. The rates should have been applied at least from the dates of their adoption. If they proved unfit measures of the value at times before their adoption, the Government should have been allowed an opportunity to prove the reasonable value, at those times, by other means.

**CONCLUSION.**

The decrees of the court below in the several cases should be affirmed, with a modification in each providing for an accounting as prayed for in the bills.

Respectfully submitted.

ERNEST KNAEBEL,  
*Assistant Attorney General.*

JULY, 1916.



## APPENDIX.

### SECTION 2339, REVISED STATUTES.

(Act of July 26, 1866.)

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

### SECTION 2340, REVISED STATUTES.

(Act of July 9, 1870.)

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

### SECTIONS 18 TO 21, ACT OF MARCH 3, 1891.

(26 Stat. 1095, 1101.)

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with

the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

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ACT OF JANUARY 21, 1895.

(28 Stat. 635.)

An act to permit the use of the right of way through the public lands for tram-roads, canals, and reservoirs, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary*



of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals, or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber.

ACT OF MAY 14, 1896.

(29 Stat. 120.)

An act to amend the act approved March third, eighteen hundred and ninety-one, granting the right of way upon the public lands for reservoir and canal purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"SEC. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of *generating, manufacturing, or distributing electric power.*"

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PROVISIONS FROM THE FOREST RESERVE ACT OF JUNE 4, 1897.

(30 STAT. 11, 35.)

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section

fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

\* \* \* \* \*

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

\* \* \* \* \*

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

\* \* \* \* \*

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

\* \* \* \* \*

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

\* \* \* \* \*

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

\* \* \* \* \*

And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the

existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

#### HOUSE REPORTS.

[Fifty-fourth Congress, second session. House of Representatives. Report No. 2790.]

#### *Right of way through public lands for tramroads, etc.*

February 4, 1897.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Bowers, from the Committee on the Public Lands, submitted the following report (to accompany H. R. 9607).

The Committee on the Public Lands have had under consideration the bill (H. R. 9607) to amend "An act to permit the use of right of way through public lands for tramroads, canals, and reservoirs, and for other purposes." The bill was referred to the Interior Department, and the opinions of the Commissioner of the General Land Office and the honorable Secretary of the Interior are herewith printed as a part of this report, and the bill amended in accordance with their recommendations.

The purpose and effect of this bill is to allow the use of the right of way through the public lands for the purpose of furnishing water for domestic purposes. The right of way is now allowed by law for furnishing water for irrigation, mining, and reservoir purposes, and your committee can not conceive of any better or higher purpose for the use of the right of way than for furnishing the water for domestic and public use.

We therefore recommend that the bill be amended by striking out the words "and fifty feet on each side of marginal limits thereof" in line 13 on page 1, and inserting the words "to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad."

On page 2 strike out, in line 15, the words "or corporation."

On same page strike out of line 16 the words "and all rights of way," and also strike out all of lines 17, 18, 19, and 20.

Amend by adding a new section as follows:

SEC. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled: "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature. And said rights of way may be used for purposes of water transportation for domestic purposes or for the development of power, as subsidiary to the main purpose of irrigation.

And as so amended the committee recommend that the bill do pass.

DEPARTMENT OF THE INTERIOR,  
*Washington, February 2, 1897.*

SIR: I have the honor to hand you herewith a report from the Assistant Commissioner of the General Land Office, dated the 29th ultimo, upon House bill 9607, entitled "A bill to amend an act to permit the use of the right of way on public land for tramroads, canals, reservoirs, and for other purposes." I concur in the suggestions and recommendations made in the report of the Assistant Commissioner so far as they relate to that portion of the bill which seeks to amend the act approved January 21, 1895; but I would strike out from the bill all that portion of it after the word "uses," in line 16 thereof, which portion refers to the rights of way heretofore granted under the act approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes."

Sections 18 to 21, inclusive, of the act of March 3, 1891 (26 Stat. L. 1095), grants a right of way through the public lands for reservoirs and canals under the regulations of this department, and maps filed for the approval of this department are required to contain a certificate that the right of way is desired for irrigation purposes only.

I do not believe that it would be for the public benefit to have the rights of way granted under that act to be subject to the uses contemplated in the act in question, but that it would tend to confuse the right-of-way acts now in existence.

Very respectfully,

D. R. FRANCIS, *Secretary.*

Hon. W. W. BOWERS,  
*House of Representatives.*

DEPARTMENT OF THE INTERIOR,  
 GENERAL LAND OFFICE,  
*Washington, D. C., January 29, 1897.*

SIR: I am in receipt, by reference from the department, for report in duplicate and return of papers of a letter of Hon. W. W. Bowers, of January 27, 1897, inclosing a copy of a bill (H. R. 9607).

The bill provides that the act of January 21, 1895 (28 Stat. L. 635), be amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramways, canals, or reservoirs, and fifty feet on each side of the marginal limits thereof, by any citizen or association of citizens of the United States, or corporation for the purpose of furnishing water for domestic, public, and other beneficial uses; and all rights of way heretofore granted, or the applications for which have been made under the act approved March third, eighteen hun-

dred and ninety-one, and entitled 'An act to repeal timber-culture laws, and for other purposes,' may be used for said purposes."

So far as this bill proposes to extend the scope of the act of January 21, 1895, there seems to be no objection except as to the language used. The width of the right of way is given as "fifty feet on each side of the marginal limits" of the "tramways, canals, or reservoirs." This language is indefinite, and I would recommend that for the words in line 13, "and fifty feet on each side of the marginal limits thereof," there be substituted the words used in the act of 1895 above, viz., "to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad." The bill allows such applications "by any citizen or association of citizens of the United States." The act of 1895 uses the same language, which has been held by the department to include corporations organized under the laws of the United States or of any State or Territory. But the present bill adds "or corporation," which, in view of the construction adopted by the department, would add nothing to the language used in the act of 1895 except to admit applications by corporations organized under the laws of a foreign country. I would therefore recommend that the words "or corporation" be omitted from the fifteenth line.

The last clause permits the rights of way granted or those for which applications are pending under sections 18 to 21, act of March 3, 1891 (26 Stat. L., 1095), to be used for "furnishing water for domestic, public, and other beneficial uses." The effect would be to destroy all distinction between the acts of 1891 and 1895 above noted. The act of 1891 grants an easement, irrevocable so long as it is used for the purposes provided by the act, held by the department to include irrigation purposes only, while the act of 1895 authorizes merely a license to use the public land, which is revocable, and which terminates with the disposal of the land by the United States, for the purposes of "mining or quarrying or cutting timber and manufacturing lumber." The easement for irrigation under the act of 1891 being of the nature of a public benefit, the license under the act of 1895 being of the nature of a private benefit. By allowing the easement granted under the act of 1891 to be used for "other beneficial uses," it would permit the right of way to be used for mining, quarrying, or lumbering, and would open the grant of the easement to all sorts of private uses, under the well-settled rulings of the courts in the Western States in construing the words "beneficial use" in the local laws. This would be contrary to the spirit of the acts of 1891 and 1895 as understood by this office in distinguishing between public and private uses, and appears, therefore, very objectionable.

I am of the opinion that if it were allowable to use the right of way for domestic or public purposes or for certain other purposes, which will not diminish the amount of water available for irrigation, as subsidiary to the main purpose of irrigation, the act of 1891 would be much more satisfactory in its operation and the intention of the

act as conferring a general benefit would be fully subserved. I would therefore recommend that all after the word "uses" in line 16 be omitted and the following added:

"SEC. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature. And said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

A copy of this letter and the papers are herewith inclosed.

Very respectfully,

E. F. BEST,  
*Assistant Commissioner.*

The SECRETARY OF THE INTERIOR.

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[House Report No. 279, Fifty-fifth Congress, second session.]

*Right of way through public lands for tramroads, etc.*

January 26, 1898. Committed to the Committee of the Whole House on the state of the Union and ordered to be printed. Mr. Devries, from the Committee on the Public Lands, submitted the following report (to accompany H. R. 1595).

The Committee on the Public Lands having had under consideration the bill (H. R. 1595) to amend "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January 21, 1895, and to amend "An act to repeal timber-culture laws and for other purposes," approved March 3, 1891, which said bill is identical in terms with H. R. 9607, Fifty-fourth Congress, second session, which was drawn in accordance with the recommendations of the then honorable Secretary of the Interior and the then Commissioner of the General Land Office anent this subject, report:

The purposes and objects of this bill are to allow the use of rights of way over the public domain, not within the limits of any park, forest, military or Indian reservation, for the purposes of supplying water for domestic and public purposes. Such rights of way are now allowed by law for furnishing water for irrigation, mining, and reservoir purposes, and your committee can not conceive of any higher or better purposes for the use of such rights of way than for furnishing water for domestic and public uses. Such a law will accrue to the advantage of supplying a pure-water system to many cities and towns in many of the States and Territories, and aid in supplying the same for many other useful purposes.

This bill is recommended by the present honorable Secretary of the Interior and Commissioner of the General Land Office, the reports of whom thereupon are hereto annexed and made a part hereof.

The committee therefore recommend that the bill do pass.



DEPARTMENT OF THE INTERIOR,  
*Washington, January 25, 1898.*

SIR: I am in receipt of your letter of the 17th instant, enclosing for my consideration H. R. 1595, entitled, "A bill to amend an act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," together with report No. 2790 on H. R. 9607.

In reply, I have the honor to transmit herewith copy of report by the Commissioner of the General Land Office, dated the 24th instant, in which he states that the present bill (H. R. 1595) is the same as the former bill (H. R. 9607), amended in accordance with the suggestions of his office in its report made January 29, 1897.

The commissioner sees no objection to the passage of the bill, and recommends a favorable report thereon.

I concur in his views.

Very respectfully,

C. N. BLISS, *Secretary.*

HON. JOHN F. LACEY,  
*Chairman Committee on the Public Lands,  
 House of Representatives.*

DEPARTMENT OF THE INTERIOR,  
 GENERAL LAND OFFICE,  
*Washington, D. C., January 24, 1898.*

SIR: I have the honor to acknowledge the receipt, by departmental reference, of a letter of Hon. John F. Lacey, chairman of the House Committee on the Public Lands, transmitting for consideration a bill (H. R. 1595) entitled "A bill to amend an act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," accompanied by committee report No. 2790 of the second session, Fifty-fourth Congress, upon a bill, H. R. 9607.

The bill (H. R. 9607) of the Fifty-fourth Congress was reported upon by this office January 29, 1897, by the former assistant commissioner. Copy of the report is printed in the above committee report No. 2790.

The present bill (H. R. 1597) is the same as the former bill (H. R. 9607), with amendments in accordance with the suggestions of this office in its former report.

Upon consideration of the bill and the reports, I see no objection to its passage. I would therefore recommend that a favorable report be made thereon.

The papers are herewith returned with a copy of this report.

Very respectfully,

BINGER HERMANN, *Commissioner.*

The SECRETARY OF THE INTERIOR.

[NOTE.—There is also a Senate report, No. 600 (55th Cong., 2d sess.), on this bill which, however, sheds no additional light.]



## ACT OF MAY 11, 1898.

(30 Stat. 404.)

An act to amend an act to permit the use of the right of way through public lands for tramroads, canals, and reservoirs, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

"SEC. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

## ACT OF FEBRUARY 15, 1901.

(31 Stat. 790.)

An act relating to rights of way through certain parks, reservations, and other public lands.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying

of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls, and upon a finding by him that the same is not incompatible with the public interest; *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

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ACT OF FEBRUARY 1, 1905.

(33 Stat. 628.)

An act providing for the transfer of forest reserves from the Department of the Interior to the Department of Agriculture.

\* \* \* \* \*

SEC. 4. That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

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ACT OF MARCH 4, 1911.

(36 Stat. 1235, 1253.)

An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and twelve.

\* \* \* \* \*

That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regu-

lations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone, and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law may obtain the benefit of this act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute.

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#### DEPARTMENTAL ORDERS AFFECTING FOREST LANDS.

[Special. 343801-1 B, "R." 1902-137,408. FS-6 da. Proposed Sevier Forest Reserve, Utah.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., August 20, 1902.

REGISTER AND RECEIVER,  
*Salt Lake City, Utah.*

GENTLEMEN: You are hereby directed, by order of the department, to temporarily withdraw from settlement, entry, sale, or other disposal under the public-land laws, all the vacant unappropriated public lands within the following described boundaries, pending consideration of the question of including said lands within a forest reserve:

[Here follows a lengthy description of lands, including those involved in suits Nos. 574 and 576.]

This temporary withdrawal, or any permanent reservation of the lands which may follow, will not affect any bona fide settlement or claim properly initiated prior to the date hereof which is duly of record within the statutory period.

You will at once proceed to note this withdrawal upon your records.

A diagram showing the said boundaries is in preparation here and will be mailed to you at an early date to enable you to verify your notations hereof.

Very respectfully,

W. A. RICHARDS,  
*Acting Commissioner.*

[Special. FS-10 da. 343801-1 C. "R." 1904-66,078. Address only the Commissioner of the General Land Office. Proposed Sevier River Forest Reserve, Utah. Restoration of a portion of the withdrawn lands.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., April 18, 1904.

REGISTER AND RECEIVER,  
*Salt Lake City, Utah.*

GENTLEMEN: By direction of the Secretary of the Interior, the order of temporary withdrawal, dated August 20, 1902, in the case of the proposed Sevier River Forest Reserve, in Utah, is hereby revoked as to the following described lands, and said lands are hereby restored to settlement and entry:

*Salt Lake meridian.*

Sections 5, 6, 7, 8, 17, 18, 19, 20, 29, and 30, of township 26 south, range 4 west.

Sections 3, 4, 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31, and 32, township 26 south, range 6 west.

Sections 1, 2, 11, 12, 13, 14, 23, 24, 25, 26, 35, and 36, township 27 south, range 4 west.

Sections 1, 12, 13, 24, 25, and 36, township 26 south, range 7 west.

Sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31, and 32, township 27 south, range 6 west.

Sections 1, 12, 13, 24, 25, and 36, township 27 south, range 7 west.

Sections 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, township 28 south, range 6 west.

Section 36, township 29 south, range 4 west.

Sections 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, township 29 south, range 6 west.

Sections 1 and 2, township 30 south, range 4 west.

Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, township 30 south, range 6 west.

All of township 31 south, range 5 west.

All of township 31 south, range 6 west.

All of township 31 south, range 7 west.

You will post this restoration upon the records of your office.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

["R" 1905-153, 357, 155, 358. FS-3 da. Proposed Tooele and Sevier Forest Reserves, Utah. Release of lands from temporary withdrawal.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., October 7, 1905.

REGISTER AND RECEIVER,  
*Salt Lake City, Utah.*

GENTLEMEN: By order dated October 5, 1905, the Acting Secretary of the Interior released the following described areas from the temporary withdrawals made on February 14, 1901, and August 20, 1902, for the proposed Tooele and Sevier Forest Reserves, and restored to settlement only all the vacant public lands, not otherwise reserved, in said areas, but provided that the lands so released from withdrawal and restored to settlement shall not become subject to entry, filing, or selection until after ninety days' notice by such publication as the department may prescribe:

In township four (4), range three (3), sections four (4) to nine (9), both inclusive, sections sixteen (16) to twenty-one (21), both inclusive, and sections twenty-eight (28), twenty-nine (29), and thirty (30);

In township four (4), range four (4), sections one (1) to four (4), both inclusive, sections nine (9) to sixteen (16), both inclusive, and sections twenty-two (22) to twenty-seven (27), both inclusive; All township twenty-six (26), range four and one-half (4½);

In township twenty-seven (27), range four (4), sections three (3) to ten (10), both inclusive, sections fifteen (15) to twenty-two (22), both inclusive, and sections twenty-seven (27) to thirty-four (34), both inclusive;

All township twenty-eight (28), range four (4);

In township twenty-nine (29), range four (4), sections one (1) to thirty-five (35), both inclusive;

In township thirty (30), range four (4), sections three (3) to nine (9), both inclusive, sections sixteen (16) to twenty-one (21), both inclusive, and sections twenty-eight (28) to thirty-three (33), both inclusive;

All townships *twenty-six* (26), *twenty-seven* (27), *twenty-eight* (28), *twenty-nine* (29), and *thirty* (30), range five (5);

In township twenty-six (26), range six (6), sections nine (9), ten (10), fifteen (15), sixteen (16), twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), thirty-three (33), thirty-four (34);

In township twenty-seven (27), range six (6), sections one (1) to four (4), both inclusive, sections nine (9) to sixteen (16), both inclusive, sections twenty-one (21) to twenty-eight (28), both inclusive, and sections thirty-three (33) to thirty-six (36), both inclusive;

In township twenty-eight (28), range six (6), sections one (1), two (2), and three (3), sections ten (10) to fifteen (15), both inclusive, sections twenty-two (22) to twenty-seven (27), both in-

clusive, and sections thirty-four (34), thirty-five (35), and thirty-six (36);

In township twenty-nine (29), range six (6), sections one (1) and two (2), and sections eleven (11) to fourteen (14), both inclusive;

In township thirty (30), range six (6), section one (1), sections eleven (11) to fourteen (14), both inclusive, and sections twenty-three (23) to twenty-six (26), both inclusive;

All south and west, Salt Lake Base and Meridian.

You will immediately post upon your records the fact that said lands were released from withdrawal and restored to settlement only on October 5, 1905.

At an early date this office will instruct you in the matter of publishing the required notice regarding the restored lands.

Very respectfully,

W. A. RICHARDS, *Commissioner.*

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# In the Supreme Court of the United States.

OCTOBER TERM, 1916.

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No. 204.

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THE BEAVER RIVER POWER COMPANY,  
APPELLANT,  
VS.  
THE UNITED STATES.

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*Appeal from the District Court of the United States  
for the District of Utah.*

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**Brief and Argument on Behalf of the State of Utah and  
Other States in Reply to Brief for the United States  
in Cases Numbered 202 to 207, Inclusive.**

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## I.

*Upon admission into the Union, a new State becomes vested with the same powers over its internal polity as the original States possess. The act of admission transfers to the new State the sovereignty over local affairs within its territorial jurisdiction.*

The outline of the Government Attorney's argument (page 23, brief) begins with the assertion that "the cases depend wholly upon the intent and appli-

cation of the laws of the United States." If by such Federal laws is meant the pertinent acts of Congress, and if there were no other legal and constitutional questions involved, we should be content to rest the cases upon the arguments already advanced in the briefs of counsel for appellants, and more particularly upon the brief of William B. Bosley, Esq., as *amicus curiae*, which is mainly limited to a discussion of the purely statutory phase of the question.

But the rights of sovereign States are involved in these cases, presenting questions of constitutional law, of State law, and, by analogy at least, principles of international law. As said by Chief Justice Fuller, in *Kansas v. Colorado*, 185 U. S., 125, 145, in speaking of this Court and of its jurisdiction:

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law, as the exigencies of the particular case may demand."

That case concerned the claims of the two States and of the United States to governmental powers over the waters of the Arkansas River; and upon the final decision, *Kansas v. Colorado*, 206 U. S., 46, dismissing both the original bill of Kansas and the petition of intervention of the United States, Justice Brewer, in quoting the foregoing statement, used this language:

"Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal."

When Kansas and Colorado were admitted into the Union by act of Congress, they, like all other States of the Union, became, in the carefully chosen words of Justice Brewer, "States sovereign and independent in local matters."

Sovereignty is defined in an article of which Justice Brewer was joint author as follows:

"The greatest attribute which a State possesses is its sovereignty. It is the supreme power, is absolute, and is subject to no judge. Judge Story defined it in its largest sense, as the 'supreme, absolute, uncontrollable power, the *jus summi imperii*; the absolute right to govern.' The rights of sovereignty extend to all persons and things that are within the territory."

22 Cyc., 1716. (*International Law*,  
by David J. Brewer and Charles  
Henry Butler.)

Now, when a new State is admitted into the Union, there is a change of sovereignty analogous to that which takes place when territory is acquired by one government from another, and followed by like consequences. As said in the article above quoted:

"When a government acquires territory from another country by treaty of cession or by conquest and subjugation it acquires the right of governmental control over the territory and also the title to the public property, the public domain, and ungranted lands."

22 Cyc., 1729.

It was on this principle that the Court held in *Martin v. Waddell*, 16 Pet., 367, that the title to the vacant crown lands, including the beds of navigable waters which were involved in that case, became vested in the State of New Jersey. In that case Waddell claimed title by virtue of certain conveyances going back to the letters patent issued by Charles II to James, Duke of York, in 1664, and Martin claimed title as lessee of the State of New Jersey, under the authority of certain State statutes. In construing this charter, the Court said at page 411:

"The questions upon this charter are very different ones. They are: Whether the dominion and propriety in the navigable water, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the duke. Whether in his hands they were intended to be a trust for the common use of the new community about to be established; or private property to be parceled out and sold to individuals, for his own benefit. And in deciding a question like this we must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century and more which has since elapsed, are all entitled to consideration and weight. It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed."

How applicable is this language of Chief Justice Taney should we substitute "America" for "England," and the "Organic acts providing for the self-government of Territories" for the word "charter," and by how much do the rights of a State transcend those of a Territory! Is it possible that a State of the Union, under our written Constitution, should have less governmental power over its internal affairs than the original Colonies possessed under the British crown?

As illustrative of the history and usages referred to in the above citation, we quote the following from the Declaration of Rights of the Colonies in 1774:

"That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council; and as the English colonies are not represented, and from their local and other circumstances cannot properly be represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed."

The principle of international law under discussion finds its first illustration in our nation's history in the Louisiana Purchase; and the case of *New Orleans v. United States*, 10 Pet., 662, shows the applicability of this principle to the admission of a State into the Union.

By the specific terms of the treaty with France under which the United States acquired the Louis-



iana territory, "all public lots and squares, vacant lands, etc." were transferred to the United States. Adjoining the river in the City of New Orleans was a quay and common, used for various public purposes. The city was proposing to sell a portion of this common, which had grown by accretion from the river, when the United States sought to enjoin the sale and obtained a decree, which was reversed by the Supreme Court. Mr. Webster was of counsel for the City upon the appeal. At page 736 Justice McLean says:

"The government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power.

"That this common, having been dedicated to public use, was withdrawn from commerce and from the power of the king rightfully to alien it, has already been shown; and also, that he had a limited power over it for certain purposes. Can the federal government exercise this power? If it can, this court has the power to interpose an injunction or interdict to the sale of any part of the common by the city, if they shall think that the facts authorize such an interposition.

"It is insisted that the federal government may exercise this authority under the power to regulate commerce.

"It is very clear that as the treaty cannot give this power to the federal government, we must look for it in the Constitution, and that the same power must authorize a

similar exercise of jurisdiction over every other quay in the United States. A statement of the case is a sufficient refutation of the argument.

"Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.

"The State of Louisiana was admitted into the Union on the same footing as the original States. Her rights of sovereignty are the same, and by consequence no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authorities to enforce the trust, and prevent what they shall deem a violation of it by the city authorities.

"All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the States and to the people.

"It is enough for this court, in deciding the matter before them, to say that in their opinion, neither the fee of the land in controversy nor the right to regulate the use, is vested in the federal government, and consequently, that the decree of the District Court must be reversed, and the cause remanded with directions to dismiss the bill."

Although this treaty purported to convey to the United States the technical legal title to this quay or common, and although, so long as Louisiana remained

a Territory, the United States exercised both State and Territorial jurisdiction over it, yet upon the admission of Louisiana into the Union, the title to this land became vested in the municipality, and the United States, by virtue of the act of admission, parted with all interest in it or control over it. To the same effect is the case of *Pollard, Lessee, v. Hagan*, 3 How., 212.

In the first draft of the brief for the United States, copies of which the author generously furnished to opposing counsel, he made use of a happy illustration, which we regret to see omitted in the final printed copy of his brief. He put an imaginary case, where it was said that Congress might have created a State whose entire area was public land—and the entire area of Utah was public land when it was acquired from Mexico—and whose entire population were lessees and licensees, without power of disposal, and where permission had been granted to the State to establish her capitol and other state institutions and municipal buildings on widely separated sites, “doubtless,” he said, “in the case supposed, ways of necessity would be implied from the very act of admission.” This was, and is, a complete concession both of the principle for which we are contending and of its operation.

Access to the capitol and other public places is of no greater consequence to the State than general ways of communication and commerce, and the many quasi-public uses and facilities upon which the development of the resources and industries of the State, and the comfort, convenience and prosperity of its inhabitants depend, particularly the very vital

use of water in an arid region, together with easements for applying it to the manifold uses which are declared by the laws of the Western States to be uses of a public nature.

All such local matters were controlled by the Colonies, through their own local governmental agencies. Ever since the adoption of the Ordinance of 1787, the regularly organized Territories of the United States have been permitted to exercise control over such matters as being rightful subjects of local legislation; and the original States have always claimed and exercised such rights and powers within their respective jurisdictions. If the United States can use its fiduciary title to the vacant lands as a subterfuge for the exercise of such powers over local affairs within the public-land States, or prevent the free exercise of such powers by those States, then clearly the public-land States are not upon an equal footing with the original States.

It is true that in the enabling acts it is provided that new States shall declare, and that in their Constitutions they do declare, that the public land shall be and remain at the sole disposition of Congress; but that is only what the Constitution itself provides. It is also true that the public lands are exempted from taxation in the same manner; but this is also delaratory of what the Constitution by implication requires.

The right to tax, as applied to governmental operation or functions, is the right to destroy, and because this is "an indestructible Union of indestructible States," neither sovereign, state or national, can tax the governmental instrumentalities or func-

tions of the other. As applied to property, the right of taxation involves the right of disposal; for in the ordinary course of enforcing the collection of taxes, the property is sold by the taxing power if payment is not made by the owner; and it is because the United States have the sole power of disposal of the public lands, that the public-land States have waived, and under the Constitution must be held to have waived, their sovereign right of taxation with respect to such lands; but none of the States of the Union have in any manner waived, nor does Congress in the enabling acts require them to waive, their reserved powers over their internal affairs. Even if such a stipulation had been required as a condition of entering the Union, it would have been, as was said in *Pollard, Lessee, v. Hagan*, 3 How., 212, 223, "void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted."

It was this sort of reserved powers of the States over their internal affairs which the Court had in mind in the case of *The Charles River Bridge v. The Warren Bridge*, 11 Pet., 420, 547, 549, 552, when it said:

"The object and the end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created, and in a country like ours, free, active and enterprising, continually ad-

vancing in numbers and wealth, new channels of communication are daily found necessary both for travel and trade and are essential to the comfort, convenience and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished.

"The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce, and the purposes of travel, shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done.

"Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither State, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot

deal thus with the rights reserved to the States; and by legal intendment and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity."

As said in the *Minnesota Rate Case*, 230 U. S., 352, 402:

"Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved."

In the case supposed by the Assistant Attorney General omitted, as above stated, from the final brief, it is submitted that there would be not only a right of way between the capitol and other public buildings within the State, arising by necessity from the very act of admission, as conceded, but, on the authority and reason of the cases of *New Orleans v. United States* and *Pollard, Lessee, v. Hagan, supra*, upon the admission of the State into the Union, that the title to the ground occupied by such public buildings would pass to the State or to the municipal bodies for whose use they were erected.

The issues presented by the bills and answers in these cases, however, do not raise any question concerning the power of Congress to dispose of the title to the public lands. That is a power which is not only inherent in ownership, but which is granted in express



terms by the Constitution, subject to the proviso that nothing in the Constitution shall be so construed as to prejudice any claim of any particular State.

While it was plausibly contended at first, as shown in the case of *United States v. Gratiot*, 1 McLean, 454, that, upon the admission of new States on an equality with the original States, the transfer of jurisdiction carried with it the right of soil to the uplands as well as to the lands submerged by navigable waters, yet the contrary rule has been so long established by the uniform action of all the departments of the Federal Government and by the acquiescence of all the new States that it would now be idle to question it.

The contention overruled in that case may be what the Assistant Attorney General is pleased to term an ancient and rejected theory; and, if so, we join with him in disclaiming it. The numerous decisions of this Court cited in the Government's brief, to the effect that Congress has the exclusive right to dispose of the public lands, have, therefore, no relevancy in these cases.

The only claim made by the appellants and by the States in these cases is that the vacant public lands within the States are subject to the jurisdiction of the States within which they are situated, and to the necessary easements for local public uses, and that this is an inevitable consequence flowing from the acts of admission of these States under the Constitution.

Moreover, this claim of the States, based upon the fundamental right of the original States to autonomy in their local affairs and the parity of all the

States under the Constitution, is not only consistent with everything in the Constitution, but that fundamental right antedates the adoption of the Constitution, the Confederation, and the Revolution itself. It is, indeed, an essential part of the Constitution, and nothing contained in the Constitution should be so construed as to prejudice it—least of all, the transient federal ownership and power of disposal of the title to vacant lands. If this fundamental principle of our Constitution, and of the dual system of government established by it, should ever be rejected as to the public-land States, or in any other respect, the days of the Republic will be numbered, the people of those States will no longer be a free people, and although the Union may continue to exist, it “will not be the Union of the Constitution.”

It is alleged in the answers, and is admitted by the plaintiff, that the defendants are occupying the lands in question for uses which are declared by the laws of the State of Utah to be public uses. The brief for the Government frankly states, on page 2, that, “The object of these suits is to test the legality of this occupancy and user in each case and, if legality be found wanting, to require the defendants to conform with the legislation of Congress or, at their option, remove from the Government lands.” In other words, the defendants, many years after the establishment of their supposed rights by such occupancy and user, under the laws of the State, are now to be placed in the dilemma of being compelled to sign a stipulation that they have no rights at all—which is the sum and substance of the proposed permit, revocable at the will

of the Secretary and subject to whatever charges, governmental regulations and restrictions he may see fit in his arbitrary discretion to impose,—“or, at their option, remove from the Government lands.” And this result is sought to be accomplished solely through the proprietary interest of the plaintiff in its vacant untaxed lands within the State, in spite of the fact that no private proprietor could be heard to assert such claims, and in spite of the rights of the State and its inhabitants to provide for the creation, continuance and control of local public uses.

In this connection it should be noted that the same Justice who decided the case of *United States v. Gratiot*, 1 McLean, 454, held sixteen years later, when the question was first presented, in the case of *United States v. Railroad Bridge Co.*, 6 McLean, 517, that the United States could not, by virtue of its ownership of vacant public lands within the State, interfere with the establishment of a public use over such lands under the authority of the laws of such State. While some of the expressions used by Justice McLean in this case respecting the right of taxation have been the subject of criticism, the principle, as above stated, which was established by the case, has never been questioned, except by the administrative departments of the Government, and that only within very recent years, and in the cases now in this Court for review.

In the meantime, in reliance upon this principle, as being in accordance with the correct interpretation of the Constitution, great investments have been made and great industries established involving rights of way over public lands for various local public uses,

as is set forth in the answers of the defendants and admitted by the plaintiff.

All of the legislation of Congress upon the subject may be construed consistently with a recognition of this principle. Although many of the acts of Congress on the subject use the word "grant," yet in the language of Justice McLean in *New Orleans v. United States*, 10 Pet., 662, 771:

"It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of a right in the power which issued it."

It was early recognized by the land department that the ninth section of the Act of July 26, 1866, recognizing that rights of way over public land might be acquired under the local laws was merely declaratory, so far as the States were concerned, and was "the result of a policy on the part of Congress, seeking to harmonize the right of sovereignty of the soil, inherent in the General Government, with certain possessory rights growing out of the peculiar condition of things found in the mining States and Territories of the west, which have become engrafted upon the public lands through the operation of local customs and legislative enactments." (See letter of Commissioner Wilson, cited on page 56, Brief on behalf of Utah and other States.)

Finally, in the language of Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat., 316, 401:

"An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."

## II.

*The Section in the Constitution relating to the admission of new States, and the concomitant disposition of the public lands, was not intended to confer additional governmental power upon Congress within the public-land States, but, on the contrary, by its express terms excludes any construction by which such powers could be implied.*

It was through an extremely superficial view of the second clause of Section 3, Article IV of the Constitution that the Circuit Court of Appeals held in the case of *United States v. Utah Power & Light Co.*, 209 Fed., 554, that the defendant could not have acquired the easements over the public land which it claimed. In the opinion in that case this clause in the Constitution is misquoted, omitting the last sentence thereof as follows:

“Congress shall have power to dispose of and make all needful rules or regulations respecting the territory or the property belonging to the United States.”

If this were all that is said or implied in the Constitution concerning the power of Congress over the public lands, there might be some plausibility in the reiterated assertions contained in the brief for the United States (as, for example, on page 123), that it is “a constitutional grant of disposing and controlling power, given in express terms, without any limitations.” But there is an express limitation upon this power, which is a vital part of this very clause, and which was intended to preserve to the individual

States, among other things, their governmental control "in matters which respect only their internal police,"—namely, that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State;" and this provision was reinforced by the adoption of the Tenth Amendment.

It may be asserted with the utmost confidence, as the documentary history of the formation and adoption of the Constitution abundantly proves, that there was no point which the framers of the Constitution and the people who adopted it were more sedulous to guard and protect than the powers of the States over their internal development and police. Aside from the main point of establishing a central government adequate to the exigencies of the Union, this point was regarded by all parties as fundamental and of paramount importance.

Although this article of the Constitution does not in terms declare that new States shall be admitted into the Union upon equality in all respects with the original States, yet Article VI provides that all "engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation," and the United States under the Confederation had entered into engagements to admit new States out of the Northwest Territory "on an equal footing with the original States," both under the deeds of cession covering this territory and their acceptance by Congress, and under the Ordinance of 1787.

Furthermore, as this Court has held, the rights of the States of this Union depend solely upon the Constitution, and necessarily all the States are equal in power, dignity and authority. The admission of a new State lies within the political discretion of Congress; but when an act of Congress admitting a State into this Union takes effect, it becomes, unlike other acts of Congress, irrevocable, and forever fixes the status of that State as a State of the Union.

This clause of the Constitution was unanimously agreed to in the Federal Convention on August 22, 1787, without much discussion, near the close of its long and wearisome session. It was drawn in the skilful phraseology of Gouverneur Morris as a substitute for the clause submitted by Mr. Rutledge (Brief on behalf of States, page 19), and perhaps with an ulterior purpose of giving to the new Congress a broad discretion with respect to the admission of new States; but it seemed to satisfy all minds upon the point in issue,—those who wished to have the new States admitted on equality with the old, those who wished the administration of local affairs to remain in the local governments of both, and those who wished the just claims of the States to jurisdiction, as well as soil, left unprejudiced by any construction of anything in the Constitution.

In the State Conventions considering the adoption of the Constitution, this clause seems to have received little attention. As noted by Justice Brewer in the *Kansas-Colorado Case*, it has received but little judicial interpretation, and, as he says, "the full scope of this paragraph has never been definitely settled."



In the Virginia Convention an effort was made by the opponents of the Constitution to alarm the inhabitants of Kentucky concerning the possibility of losing their rights to the navigation of the Mississippi River by a treaty made under the proposed Constitution. To this suggestion Governor Randolph replied, *Elliot's Debates*, Vol. III, 363 :

"To make a treaty to alienate any part of the United States, will amount to a declaration of war against the inhabitants of the alienated parts, and a general absolution from allegiance. \* \* \* The gentleman wishes us to show him a clause which shall preclude Congress from giving away this right. It is first incumbent upon him to show where the right is given up. There is a prohibition naturally resulting from the nature of things, it being contradictory and repugnant to reason, and the law of nature and nations, to yield the most valuable right of the community, for the exclusive benefit of one particular part of it.

"But there is an expression which clearly precludes the general government from ceding the navigation of the river. In the 2nd clause of the 3rd section of the 4th article, Congress is empowered, 'to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States.' But it goes on, and provides that 'nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular State.' Is this a claim of the particular State of Virginia? If it be, there is no authority in the constitution to prejudice it. \* \* \* The territorial rights of the State are suffi-

ciently guarded by the provisions just recited."

And speaking again on the same point, he says, *Ib.*, 504 :

"An honorable gentleman says that this is the Great Charter of America. If so, will not the last clause of the 4th article of the Constitution secure against dismemberment? It provides that 'nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.' And if this did not constitute security, it follows from the nature of civil association, that no particular part shall sacrifice the whole."

And, it may be remarked in passing, it was in accordance with this view of the Constitution that it was considered essential to have the consent of the State of Maine to the Ashburton treaty, fixing our Northeastern boundary.

Replying to the further suggestions of Messrs. Henry and Grayson concerning the danger apprehended from the exclusive legislative powers of Congress over the proposed ten miles square and strongholds, Mr. Wilson Nicholas said, *Elliot's Debates*, Vol. III, 434 :

"As the state, within which the ten miles square might be, could prescribe the terms on which Congress should hold it, no danger could arise, as no state would consent to injure itself: there was the same security with respect to the places purchased for the erection of forts, magazines, &c.; and as to the

territory of the United States, the power of Congress only extended to make needful rules and regulations concerning it, without prejudicing the claim of any particular state."

It was uniformly contended by all the advocates of the adoption of the Constitution that the United States could exercise only those powers which were granted by the Constitution, and that the States retained all powers which were not so granted and which were not prohibited to them by the Constitution.

For the convenient reference of the Court, we print in an appendix a few of the typical arguments on this point by such men as Madison, Hamilton, Marshall, Livingston, Randolph, Ames, Davie, Sherman, Ellsworth, the Pinckneys of South Carolina, Pendelton, Corbin, Iredell, and George Nicholas, together with recommendations of the Conventions respecting amendments, which led to the adoption, among others, of the Tenth Amendment.

In discussing this clause 2 of section 3, Article IV., Justice Baldwin says in his scholarly essay on the "Origin and Nature of the Constitution and Government of the United States," Supplement to 11 Peters (9 L. ed., 922) :

*"The Constitution prescribes the rule of its interpretation.*

"I cannot close this view of the constitution without again referring to that clause of the instrument, which, connected with its exposition by this Court, I have said is the key to its meaning; it is also the rule prescribed by its framers, whereby to ascertain the extent of the grant of territory or juris-

diction, the rights of soil, the powers of government, as well as the restrictions on the states. 'The congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States;' *and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.*

"It has always seemed to me that the latter part of this clause is one of the most, if not the most important sentence in the whole instrument; though it has received but little, if any attention. Its words are most comprehensive, extending to the whole constitution, as well as to every subject to which the United States, or any particular state, had any claim; they must not be deemed senseless, but have some meaning and application, which will correspond with the preceding part of the clause; the intention with which they were introduced, and the subject matter of reference. By this clause a power was given to dispose of, and regulate the territory or other property belonging to the United States, acquired, as has been seen, by cession from the particular states of the Union, or foreign states; and that regulation was but another word for legislation, and the power of creating territorial governments, or corporations. It has been also shown that this Court have uniformly held, that the right to property and jurisdiction, or legislative power, are concomitant, and vested in the same original proprietor of the soil of a state or territory; and that all the powers of congress, whether exclusive over their own property or territory, or limited over the several states; is of the same nature and char-

acter, conferred by the same instrument, as one uniform law throughout the United States. (Page 102.)

"During the revolution, the contest was for property, which was settled by the adoption of the articles of confederation, which prohibited the United States from depriving a state of territory for their benefit. It did not require the spirit of prophecy to foresee, that under the constitution, there would be a similar contest for power; and it would have been strange if some endeavour had not been made to avoid it. It was a most delicate effort to so frame a constitution, as to define the precise line by which the granted and reserved powers of government should be so separated, as to avoid any collision; the necessity of the case requires it to be on some point, between a delegation to congress by express words, and such general terms, as by construction might be held to comprehend such as were not granted to them. Perhaps a better term could not be used than the one adopted, to avoid both difficulties. 'Shall be adjudged,' is a parliamentary term of great significancy: a word of command that such a construction shall be given, as in the 12 Car., 2, prohibiting the king from granting land by any other than the tenure of soccage. His grants must be so taken as to convey such tenure, whatever may be their words; Vide ante, and 3 Ruff, 192: 'Shall not be construed,' is a term in the 11th amendment, the meaning and effect whereof has been settled by this Court, as before stated; and must receive the same interpretation when it is found in the body of the instrument.

"When, therefore, we find a declaration, '*nothing* contained in this constitution *shall*

*be so construed,* &c., it can have no meaning, unless it be to prohibit any interpretation of the grant by which it shall operate to the prejudice of the grantor, or grantee, *by construction merely.* Taken in connection with the 10th amendment, such intention is apparent; by reserving what is not granted or prohibited, that which is granted or prohibited, is not reserved; whereby the grant must be interpreted according to the import of its language, without straining it beyond, or within its obvious meaning." (Pages 103-104.)

"It cannot be doubted that these contests for power were foreseen by the framers of the constitution, and I have always been satisfied, that they intended to guard against both constructions; so as alike to prevent the powers of congress from being frittered down to inefficiency for the objects of the grant, or the reserved powers of the several states from being usurped—*by construction.* No clause could be more appropriate to the purpose, and none could more clearly express the intention, than that 'nothing in this constitution shall be so construed.' I do not feel at liberty to expunge one word from it, or to give it a more narrow application than it imports; it embraces every thing in the constitution, whether by way of grant or restriction, and prescribes for the interpretation of all its provisions, the only rule by which its true meaning can be ascertained, and the movements of the state and federal systems be preserved in harmony as one great whole. It ought, in my judgment, to receive the most liberal and benign interpretation which the words admit of; and if so taken, will effectuate the most salutary result—'certainty, the

mother and nurse of the repose and quietness' of the Union." (Page 107.)

The same significant language, "shall not be construed," is used in the 9th, 11th and 17th amendments. The 11th amendment grew out of the case of *Chisholm v. Georgia*, 2 Dallas, 419, in which a majority of the court held that their jurisdiction extended to cases in which a State was a defendant. After the adoption of this amendment, this Court held, in *Hollingsworth v. Virginia*, 3 Dallas, 378, that, "there cannot be exercised any jurisdiction, in any case, past or future, in which a State was sued by citizens of another State, or by citizens, or subjects, of any foreign State."

In the former case Justice Iredell expressed the opinion that the State was exempt from suit. In his opinion he used this language:

"Every state in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course the part not surrendered must remain as it did before.

"So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly



against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money."

His view was the same view which was taken by Marshall and Madison in the Virginia Convention and by Hamilton in *The Federalist*. Marshall said, *Elliot's Debates*, Vol. III, 555:

"With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to the legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?"

And in speaking of this jurisdiction, Madison said, *Ib.*, Vol. III., 533:

"Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court."

In No. 81 of *The Federalist*, Hamilton says:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. \* \* \* The contracts between a nation and individuals, are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done, without waging war against the contracting state: and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

The claim of a sovereign State of a right to be exempt from suit without its consent, and even of its right of representation in the Senate, is of no higher degree—is, indeed, of less consequence to its existence as a State—than its claim of the exclusive right to govern its internal affairs. And are not those pregnant words, “shall not be construed,” a solemn mandate of the people to the Courts, as the special guardians of the Constitution, to protect the States and their people in their rights, while at the same time upholding the just powers of the Federal Government? “To what quarter,” said John Marshall in the Virginia Convention, “will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.” (*Elliot's Debates*, Vol. III, 554.)

The brief for the Government (page 110) points to the fact that the United States cannot be impleaded without its consent, in any suit, in any court, and cites the case of *Deseret Water, Oil & Irr. Co. v. California*, 167 Cal., 147, 138 Pac., 981. In that case it was held that vacant State land might be condemned for water-power purposes under authority of a State statute, notwithstanding the fact that the land was situated within the exterior boundaries of a Federal forest reserve. In discussing some of the very vital questions here at issue, the Court said, page 159:

“But on the general argument we think that the true interests of the State are quite the opposite of those declared in the brief of the attorney general. One familiar with the constitutional history of the United States need not be reminded of the jealousy with

which, before the adoption of the present constitution and during the sessions of the continental congress and the existence of the articles of confederation, the original states, and particularly Virginia, in their cessions of lands to the United States guarded their own rights and limited the powers of the United States over them, until in October, 1780, Congress resolved that the lands which may be ceded to the United States by any particular state shall be disposed of for the common benefit of the United States and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights to sovereignty, freedom and independence as the other states. The fundamental proposition assented to by the United States upon which these cessions were based was that the public lands within new states, existing or to be created, should be disposed of, sold, for the benefit of the United States, for the reason that the states believed it would be injurious to their sovereign rights that any large areas of land within their boundaries should be permanently beyond their taxing power and control and within the sovereign jurisdiction of another power. Further it is to be remembered, that all new states were to be admitted to the Union upon terms of exact equality with all other states, and the act of admission of the state of California declared that 'the state of California shall be one and is hereby declared to be one of the United States of America and admitted into the Union on an equal footing with the original states in all respects whatever. The people of said state shall never interfere with the primary disposal of the public lands

within its limits.' In the case of *Pollard's Lessee v. Hagan*, 3 How. 212 (11 L. Ed. 565), the supreme court of the United States with great learning discusses these contracts between the several states and the United States and the meaning and force of the constitutional provisions thereafter passed. It is there declared as to the government lands within such states that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to their territory, or in and to the territory of any of the new states, excepting the right over them of executing the trust, which trust was to provide for their disposition by cessions or sale. It is further held that every new state comes into the Union upon terms of equality with all other states, and such an equality cannot exist if in one state it exercises sovereign powers over the lands, while in another it has disposed of such lands, or in the execution of its trust must dispose of them. In *Coyle v. Smith*, 221 U. S. 559, 55 L. Ed. 853, 31 Sup. Ct. Rep. 688, these doctrines are reasserted and affirmed, and the power of the United States to pass any law which will create inequality between the states has repeatedly by the supreme court of the United States itself been declared to be void and of no effect. *New Orleans v. De Armas*, 9 Pet. 224, 9 L. Ed. 109; *Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800; *Illinois Central R. R. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. Rep. 110; *United States v. McBratney*, 104 U. S. 621, 45 L. Ed. 1032, 21 Sup. Ct. Rep. 924; *Hardin v. Shedd*, 190 U. S. 508, 47 L. Ed. 1156, 23 Sup. Ct. Rep. 685; *United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662.

"We are of course not unmindful of the decisions of the supreme court of the United States, such as *Camfield v. United States*, 167 U. S. 524, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864; *Kansas v. Colorado*, 206 U. S. 89, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655, and *Light v. U. S.* 220 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485, which declare that, within the governmental trust to 'dispose' of its public lands, vast areas of them within existing states may be taken from the dominion and control of the state and placed in perpetual reserve, and that the execution of the trust under which Congress holds these lands rests with Congress alone. Whether inconsistency and hostility exist between this latter line of decisions and that headed by *Pollard's Lessee v. Hagan*, the Supreme Court of the United States itself in due time will declare. But here we desire to point out that while the state of California was admitted as a sovereign state of the Union upon equal terms with all the other states, and while it has been judicially declared that an essential part of that equality is the disposition of the public lands within the state, to the end that the revenues by taxation therefrom and the control over them may be vested in the state, we have in California a withdrawal by the United States from sale and a placing in reserves of one-third of the area of the whole state—an area greater than the combined territory of New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New Jersey, and Maryland. Not this alone, but we have in these withdrawals a refusal upon the part of the United States to yield to the State of California control over its natural sources of wealth. Its forests, its

mines, its oil-bearing lands, its power sites and possibilities have been withheld by the United States, which proposes to exercise over them, and is exercising over them, the 'municipal sovereignty' which the supreme court of the United States in *Pollard's Lessee v. Hagan* declared not to exist. If, at the time of the proposed cession of its lands by Virginia, Congress had declared its intent to be that which it has actually executed in the state of California, little doubt can be entertained as to the answer which Virginia would have made. It is indeed a departure from the accepted construction of these constitutional provisions to have it said that the United States may, as here, withdraw from state use one-third of the area of a sovereign state, forever deny to the state the sovereign power of taxation and control over these lands, and develop and exploit them under its own rules and regulations for the enrichment of its own treasury. And so, coming to the specific section of land here under consideration, if it has possibilities of water storage and power development, certainly it is to the interest of the state that these potentialities should be developed in the interest of its citizens and the revenue derived therefrom by rates, tolls, and taxation go into its own treasury, rather than to witness them lying undeveloped and unimproved, or, if improved at all, improved for the enrichment of the national treasury. This is meant to convey no criticism of true conservation of natural resources; but it is a simple declaration of a manifest fact that in a state such as California, a large part of whose territory and whose natural resources are taken away from state control,

and denial of the right of taxation on such lands, the erection of an *imperium in imperio*, are developments of governmental ideas not dreamed of at the time of the adoption of the constitution, nor at the time of the decision of *Pollard's Lessee v. Hagan*. And in the state of California the cause of conservation would not suffer if intrusted to the state itself."

In the cases at bar, however, the Government itself is plaintiff, and they neither present any question concerning the non-suability of the sovereign without its consent, nor the taking of its property by condemnation proceedings. Where there is no "taking," in the sense in which that word is used in the Constitution, there is no need of condemnation or compensation.

*United States v. Chandler-Dunbar Co.*, 229  
U. S., 53, 62.

*Willink v. United States*, 240 U. S., 572,  
580, 581.

And, just as the States and their people have delegated to Congress the power to regulate commerce, this Court holding that included in that power is the right to protect and improve the navigability of the navigable waters of the Nation; that the technical title to the beds of such waters and riparian rights appurtenant thereto are held in subordination to this power of Congress, and that for this reason there is no "taking" when Congress exercises its governmental powers over such navigable waters and the beds thereof—it is submitted that, in like manner and by



a perfectly parallel course of reasoning, when Congress admits into this Union a State containing vacant public lands, there passes to the State, along with its other sovereign powers under the Constitution, the right to legislate concerning its own internal development and affairs, and to utilize and regulate the necessary easements for its public uses over such lands, including the beneficial use of water for all purposes except navigation, and that there is no "taking" of Government property when this power is exercised by the State or under authority of its laws.

Throughout the brief filed on behalf of the Government, counsel proceeds upon the false assumption that the appellant is claiming the right to interfere with the Federal Government's primary disposition of the soil and to take or appropriate the lands of the Federal Government. If the brief were stripped of this false assumption, which has no foundation in the claims made by the appellant, there would be little, if anything, left in the argument of the Government as contained in the brief filed in this case. What we do claim is the right to subject the lands of the Federal Government to the essential public easements which will permit the development of the internal resources of the State and the application of the waters within its borders to a beneficial public use in accordance with the laws of the State, the title to the land remaining in the United States and subject to disposition under acts of Congress.

The use of water for any beneficial purpose is a public use under the laws of the State of Utah. *Clark v. Nash*, 198 U. S., 361. The public control over the appropriation of water impresses the use of the ele-

ment with its public character. That its use for power purposes is a public use is not only declared by the laws of the State, but is recognized in the regulations of both Departments (Transcript, Beaver River Power Co. v. U. S., pp. 48 and 78), which require the permittee to stipulate, "upon demand in writing by the Secretary to surrender the permit to the United States or to transfer the same to such State or municipal corporation as he may designate," etc. If a State or municipal corporation may succeed to the real or visionary rights of a permittee under one of these permits, it should be enabled to acquire such rights originally. But neither the State nor the municipal corporation may sue the United States without its consent.

If the extravagant claim of the Assistant Attorney General is well-founded, namely, that the United States retains control of all the unappropriated waters on the public domain within the States for all purposes (page 144, brief), then the States and their municipal corporations are, like individuals and private corporations, powerless to acquire either the right to use such water, essential to their physical as well as to their political existence, or the necessary rights of way over the public land for the use thereof, except by a permit under the act of February 15, 1901, which embraces in its terms the use of water for every conceivable purpose.

Why should a State of this Union, "sovereign and independent in local matters," be compelled to wait upon the pleasure of an administrative officer of the General Government under a general act of Congress, or the special action of Congress, before it can exer-

cise its sovereign, constitutional powers over a matter so essentially local in its character and so vital to its existence? Is not a statement of the proposition a sufficient demonstration of its profound absurdity? The argument on behalf of the Government is, however, logically driven to this absurdity, because if the Federal Government may control the appropriation and use of water for one purpose within a State, it may control it for all purposes.

In this connection, it is interesting to note the novel and ingenuous statement of the Assistant Attorney General (page 145, Brief), respecting the case of *Kansas v. Colorado*, 206 U. S., 46, namely, that the Government sought to maintain its intervention upon the ground that, because of the conflict of laws in the two States respecting the use of the waters of the Arkansas River, "the entire power of regulation must be held to reside in the United States," and, further, that "Its interest in the use of water upon its own lands, or for the advantageous reclamation, use and disposition of its own lands, was not in issue,"—which is so strikingly at variance with the position of counsel for the Government in that case and with the opinion of this Court, delivered by Justice Brewer.

In the Court's statement of the case, the substance of the Government's petition in intervention is set forth, on pages 54-57, in the language of counsel, in which it is said that the first paragraph:

" 'Describes the Arkansas River from its source to its mouth, and alleges that it is not navigable in the States of Colorado and Kansas nor the Territory of Oklahoma, but is navigable in the State of Arkansas and the Indian Territory.' "

“The eighth paragraph alleges that the common-law doctrine of riparian rights is not applicable to riparian lands within the arid region, and that only by the use of waters of natural streams and flood waters for irrigation and other beneficial purposes can the lands in the arid region be made productive, and only by such use can additional areas be reclaimed and rendered productive and salable.’” (Page 56.)

Upon the trial and argument of the case, however, the Government made no contention that any appropriation of the waters of the river by Kansas or Colorado had affected its navigability; and, as said in the opinion, page 86:

“It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas River, as it runs through Kansas and Colorado, are large tracts of those lands; that the National Government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters.

“In support of the main proposition it is stated in the brief of its counsel:

“That the doctrine of riparian rights is inapplicable to conditions prevailing in the arid region; that such doctrine, if applicable in said region, would prevent the sale, reclamation, and cultivation of the public arid lands, and defeat the policy of the Government in respect thereto; that the doctrine which is applicable to conditions in said arid

region and which prevails therein, is that the waters of natural streams may be used to irrigate and cultivate arid lands, whether riparian or non-riparian, and that priority of appropriation of such waters and the application of the same for beneficial purposes establishes a prior and superior right.' "

The opinion proceeds to hold that while the United States may reclaim its lands, yet its legislation on the subject cannot override that of the States; that it must comply with the laws of the States respecting the appropriation of water; that it has no greater powers in the public-land States than within the limits of the original thirteen (page 92); that "each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters" (page 93); that, as a sovereign State, Colorado was free to adopt the doctrine of appropriation, although the laws of Kansas recognized generally the common-law rule of riparian rights; that Congress could not determine the rule which should control between the two States, nor could either State enforce its policy upon the other, but that the controversy between them was one of a justiciable nature; and finally (page 117) dismisses "the petition of the intervenor, without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River." The opinion clearly holds, therefore, that the governmental power of the United States over waters within a State is limited to the preservation and improvement of their navigability under the com-

mercial clause of the constitution, and that the governmental powers of the States over the subject for all other purposes are supreme and exclusive.

It may also be worthy of note that the order dismissing the petition of intervention was "without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River," which must have been intended to include action through its executive departments, while the bill of Kansas was dismissed with leave to institute further proceedings whenever it should appear that it was suffering substantial injury; for, as illustrated by the case of *Willink v. United States, supra*, the United States may proceed to improve its harbors and other navigable waters, without proceeding to a condemnation of the rights of riparian owners, in the exercise of its governmental powers over the subject.

Thus, ten years ago, and more than ten years after the passage of the act of May 14, 1896, we find this Court holding in the *Kansas-Colorado Case* that the doctrine of appropriation prevailed in the arid region by virtue of having been adopted by the laws of the States situated in that region,—not by virtue of its recognition by Congress in 1866,—and counsel for the Government contending in that case that priority of appropriation for beneficial purposes establishes a prior and superior right,—a right which counsel for the Government in the cases at bar contends was taken away by acts of Congress passed fifteen and twenty years ago.

## III.

*The existence of easements of a public nature over vacant Federal lands does not interfere with the disposal of such lands by the Federal Government; and the claim made by the States of the right to control the creation and continuance of such easements, within their respective territorial jurisdictions, does not conflict with the power of Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."*

As shown in the brief in behalf of the State of Utah and other States (pages 92-93), when a tract of land to which a right of way has attached is disposed of by the Government, the purchaser takes the land at its full area and pays the full price therefor. This has always been the practice of the land department. Even the approval of a map under the general right-of-way acts does not have the effect to vest the title to the land in the applicant. The title still remains in the United States, the applicant having "the right only to the use of the land, which may be disposed of subject to that right." This is true whether the easement be for a railroad, ditch, canal, reservoir, telegraph line, or other public purpose.

When the use ceases, as has often happened in case of abandoned railroad lines when new lines have been built to improve the course and grades of the road, or when new main ditches have been built and old ones abandoned, in order to irrigate wider areas,—the easement over such abandoned lines is for all practical purposes terminated. So, if an appro-

priator of water is for any reason prevented from completing his appropriation and has no water to apply to beneficial uses, he acquires no easement merely by constructing a ditch. Beneficial use is the basis, the measure and limit of the right, both to the water and the easement.

This principle is illustrated by the case of *Crane Falls &c. Co. v. Snake River &c. Co.*, 24 Idaho, 77, cited on page 97 of the brief for the Government; although its applicability to the cases at bar is imperceptible, for in all of these cases the water has been applied to beneficial uses for many years. The Idaho case, however, does serve as a sad commentary on the restrictive measures of the executive departments, in recent years, respecting the appropriation of water and the development of the natural resources of the Western States, which restrictive measures the brief for the United States seeks to justify in the name of conservation.

In that case the Crane Falls Company, a construction company, had entered into a contract with an association of settlers in 1909 to build a power plant, at an estimated cost of half a million dollars, also a pumping plant and irrigation system, which was to be turned over to the settlers on certain agreed terms. The company had spent about \$17,000 in building ditches and canals, when it was forced to cease work. As said by the Court:

"The main object and purpose of the settlers was to get water for the land, so that they could make final proof on their desert entries during the year 1910, but nearly two years elapsed after the partial construction



of said canals without any further work being done. Some of the settlers lost their lands; some were required to purchase scrip with which to secure title, and others were forced to make refilings."

Thereupon the settlers withdrew their escrow agreements with the Crane Falls Company, and entered into a new contract with the Snake River Company, a Carey Act company, which completed an irrigation system for the settlers, making use of the ditches which the Crane Falls Company had partially constructed. The latter then brought an action to quiet title to the ditches in question and for an injunction. A decree in favor of the defendant was affirmed on appeal.

The prime cause of the failure of the Crane Falls Company to complete its contract to build the power plant and irrigation system was the withdrawal of the proposed power site, from sale or entry, by the Secretary of the Interior, although the Court expressed the opinion (page 77) that "in part it would seem to be the fault of the appellant for not rushing the work in the construction of said plant before the power site was withdrawn." But the present cases show how little, in the view of the department, it would have availed the appellant in that case to have entirely completed its plant and put it in operation before the withdrawal. The significant fact in the case is that an important public enterprise, involving the settlement and development of a new country, was halted by the arbitrary act of an administrative officer of the Federal Government. What comments should be made upon the iniquitous operation of a

policy of reservation, which thus resulted in a heavy loss to the original contractors, in untold hardships and losses suffered by the original settlers, and in the arrested development of the State's resources, and its consequent loss of revenue? Is it not a palpable mistake to call such results, or such a policy, conservation?

Reservation is not conservation. Moreover, there is a fundamental distinction between reserving and withdrawing vacant land from sale or entry,—which, however unfairly it may operate in the new States, is within the power of Congress,—and withdrawing it from the jurisdiction of the State in which it is situated,—which is beyond the power of Congress.

If in the case of *Pollard, Lessee, v. Hagan, supra*, the Federal Government had, for instance, withdrawn from sale the land in question under Mobile Bay, instead of issuing a patent for it, confirmed by special act of Congress, nevertheless, upon the admission of Alabama into the Union, the title to that land would have already passed to the State or under its laws. In that case there was a disposition of the title, arising by operation of law from the act of admission.

In the cases at bar, however, no contention is made that the title to any of the vacant public land, or the power of disposing of the same, is "wrested away from Congress" (brief for the Government, page 26); but it is maintained that Congress, by its free act and deed in admitting a State into the Union, surrenders to that State not only title and dominion to lands under navigable waters for all uses and purposes except navigation, but also, under the Constitution, as framed by the fathers and adopted by the

people of the original States, the new State becomes vested with the same exclusive jurisdiction over its internal development and police which was retained by the original States respectively.

The withdrawal of public lands from sale or entry for purposes of a forest reserve cannot deprive the State of its jurisdiction over the withdrawn lands, nor do they thereby cease to be public lands of the United States. Moreover, the Acts of Congress, authorizing such withdrawals, expressly recognize that the State retains its jurisdiction, and also that the waters on such withdrawn lands may be used under the laws of the State.

The interesting historical account of the legislation under discussion contained in the Government's brief clearly shows that it has been the consistent purpose of Congress to encourage the development of the resources on the public domain through the broadest possible use of water, but this purpose has been frustrated by the narrow and illogical constructions put upon the Acts of Congress by the administrative departments of the Government. What could be more illogical than to say that a policy of revocable permits instead of permanent easements would encourage development and the investment of capital and labor? There is a reason for the provision in the Act of 1901 that a permission, or a reservation of a right of way, may be revoked for failure to utilize the same; but it cannot be imputed to an intelligent Congress that it ever intended to grant to an administrative officer the arbitrary power of revoking a permission after it had been acted upon and of destroying the value of large investments in a public service, with the idea that

investments would be thereby encouraged. The reasons for this proviso are fully set forth in the original brief on behalf of the State of Utah and other States.

The Act of June 4, 1897 (30 Stat., p. 32), supplementing the Act of March 3, 1891 (26 Stat., 1095, 1103), under which public lands bearing forests may be withdrawn from sale or entry for the purpose of protecting the forests thereon from destruction, and incidentally to secure favorable conditions of water flows, and under which the Secretary is authorized to make rules and regulations to insure these objects, indicates an effort on the part of Congress to protect the forests from destruction and depredation, in order to furnish "a continuous supply of timber for the use and necessities of the citizens of the United States." The Secretary of the Interior before the Act of February 1, 1905 (33 Stat., 628), and thereafter the Secretary of Agriculture, is authorized to make such rules and regulations, and to regulate the use and occupancy, for private purposes, except mineral locations, of the land so withdrawn, and to make reasonable charges therefor as well as for the use of the natural products of said land, such as timber and grass, or to permit "the use of timber and stone found upon such reservations, free of charge, by bona fide settlers," and other persons mentioned in the statute. It may be no stretch of language to apply the much abused word "conservation" to such a law and to the rules and regulations made thereunder. But it is a perversion of terms, and a contradiction of the spirit and language of the statutes, to say that the withdrawal of water from use, or the imposition of any charges or restrictions upon the use of water for any

beneficial purposes, is either true conservation in the abstract, or that it is in any manner authorized by any Act of Congress.

The established policy of the arid states of the West, born of their necessities and therefore permanent in its nature, is that every drop of water should be made to do its highest duty. Not only must the wisdom of this policy be admitted by all who are familiar with local conditions, but its existence and validity have been repeatedly expressly recognized by the Acts of Congress as well as by its acquiescence, both in the Territories, where its legislative powers are supreme and controlling, and in the States, whose governmental powers over the subject must, under the Constitution, be held to be supreme within their territorial jurisdictions.

Much stress is laid in the brief for the Government on the so-called policy of conservation; but are not measures which tend to prevent the use of water power the precise opposite of conservation? Coal, oil, and other fuels, which are consumed in power production, can only be conserved by not using them. On the other hand, if water power is not used, it is wasted; and when it is substituted for power produced by steam or gas, it means the conservation of fuel which cannot be replaced. Thus the use of water power, which is sought to be enjoined in the cases at bar in the name of conservation, is itself a double conservation. The use of that word in connection with these cases is, therefore, as inconsistent and unjustifiable as the use of the word "nuisance" applied to the plants of the defendants. As said by this Court in *Owensboro v. Cumberland Telephone Company*, 230 U. S., 58, 72.

"This repealing ordinance, though it purports to be an exercise of the police power in the 'whereas' clause, proceeds immediately to contradict the assertion that the poles and wires are a 'nuisance' by the proviso giving the company an opportunity to purchase the right to continue the use of the streets under conditions 'to be prescribed by ordinance,' upon request of said company. It is a plain attempt to destroy the vested property right under which a great plant had been installed and operated for more than twenty-five years."

The remark of the Court above quoted is all the more applicable to the cases at bar, for the reason that, while the municipality has "the police power" over its streets, the United States has no such police power within the territorial jurisdiction of a State.

Occupancy for a public use—which, when once established, cannot be discontinued at the instance of a proprietor of the land so occupied—is, of course, limited by law to what is reasonably necessary for the purpose (*Stuart v. Union P. R. Co.*, 178 Fed. 753); and the United States, as a proprietor within a State rather than as a government, is entitled to the same right as any other proprietor to have such a limit put upon the extent of the occupancy of its vacant lands by local public uses, and is also entitled to the same rights as an appropriator of water for the purpose of reclaiming and disposing of its arid lands, or for any other lawful purpose, which are given to other appropriators of water by the laws of the States. Under the Fourteenth Amendment the States could not, if they would, deny these rights to the Federal Govern-

ment; and, as has already been pointed out (original brief on behalf of the State of Utah and other States, page 33), it has been held that the United States may by its own legislation protect its proprietary interests from private trespass and waste. Hence, it must be clear that the fanciful apprehensions of the Assistant Attorney General that a recognition of the right of the States to control their local public uses, including the beneficial appropriation of water, would mean that the coal and oil deposits, the timber and grazing lands, held in Federal ownership, would pass to the States, and that "the cherished policy of reclaiming the arid public lands by irrigation would become impossible" (page 112, Brief for the United States), are utterly chimerical and wholly without foundation in law or in reason.

That the existence of an easement arising under the laws of a State does not interfere with the disposal of the land is shown in the interesting case of *Idaho-Iowa Lateral & Reservoir Co. v. Fisher*, 27 Idaho, 695 (151 Pac. 998). In that case the plaintiff had constructed a reservoir on a school section under authority of a State statute, and subsequently the land was purchased from the State by defendant's predecessors in interest, and the defendant was claiming title to the land free from the encumbrance of the reservoir, and plaintiff brought an action to quiet title thereto. It was argued that the plaintiff could have acquired no title because he had not purchased the land at public auction for not less than ten dollars per acre, as required by the Idaho Constitution and the enabling act. Referring to the Act of July 26, 1866, the Court says, page 703:

"Congress recognized the fact that the rights of way for ditches, reservoirs, and canals in the arid states and territories of the west were absolutely essential for the development of those states and territories, and while the act of Congress admitting Idaho into the Union provides that none of the lands granted by said act to the state should be sold except at public sale and for not less than ten dollars an acre, it was not intended that such act should be construed to be in contravention of the wise policy adopted by Congress by the act of 1866, and prevent the irrigation and reclamation of the arid lands of the state.

"It is clear that the granting of a right of way for a ditch, canal, or reservoir under the provisions of sec. 14, art. 1, of the state constitution is not a sale or disposal of the land such as is contemplated by said admission act, but simply the granting of an easement, the legal title to the land remaining in the state."

And at page 705:

"In *Hollister v. State*, 9 Ida., 8; 71 Pac., 541, the court said:

"When Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction. (Numerous authorities are here cited.) But even if Congress had the authority in granting these lands to the state, to restrict and prohibit the state in the exercise of the power of eminent domain, we do not think it was intended or attempted in the



admission act. It was evidently the purpose of Congress in granting sections 16 and 36 in each township to the state for school purposes to provide that the revenue and income from all such lands should go to the school fund, and that when sold it should be at the highest market price. We cannot believe that Congress meant to admit into the Union a new state, and by that very act throttle the purposes and objects of statehood by placing a prohibition on its internal improvements. To prohibit the state the right of eminent domain over all the school lands granted would lock the wheels of progress, drive capital from our borders, and in many instances necessitate settlers who have taken homes in the arid portions of the state seeking a livelihood elsewhere.'

"As a matter of history considerable land in the state of Idaho that has heretofore been reserved for reservoir purposes has already been abandoned, and that will be the case, no doubt, in regard to some of the lands now used as reservoirs. It is clear that where the right of eminent domain is exercised with reference to state lands, if it be held that a title less than fee simple is to be conveyed by such proceedings, and if at the same time the constitutional prohibition against sales other than at public auction at a minimum price of ten dollars per acre be construed to apply only where a fee-simple title is to be conveyed, then the two sections (sec. 14, art. 1, and sec. 8, art. 9) are reconciled, and both are made effective. It was not intended that a fee-simple title must be taken in case land is condemned for a reservoir, and in the case of condemnation of state lands it was clearly not intended that a fee-simple title should be

taken to land for that purpose. If it were intended by the provisions of section 5211 to compel the condemnor to take the fee-simple title to land desired for a reservoir, it is clearly repugnant to the provisions of the constitution so far as reservoir, dam sites, etc., are concerned when applied to state lands.

"Sec. 14, art. 1, of the constitution does not provide that the fee-simple title for state lands used as reservoirs must be taken, but does provide that 'The necessary use of lands for the construction of reservoirs' shall be 'subject to the regulation and control of the state,' meaning thereby that such matters shall be controlled by the legislature of the state by legislative enactment."

In conclusion, we are firmly persuaded that a review of the whole body of congressional legislation on the subject, in connection with the history of the times, and with the rulings of the Land Department as well as the decisions of Courts, will demonstrate how every act of Congress on the subject since 1891 has been eventually used by the Department as an excuse for assuming more and more control over a matter which was at first tacitly recognized as belonging to the States, and afterwards expressly so recognized in the act of 1866; that, beginning with the act of 1891, which was intended to encourage private enterprise in the appropriation of water by making conveyances of the title by the Government subject to rights of way therefor, even before construction and use, the Department has placed narrow constructions on that and all subsequent acts, so that in the

end they have assumed a control over the subject, which is now claimed to be paramount and exclusive, and which is both contrary to the intent of Federal legislation and in violation of the rights of the States under the Constitution.

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### Appendix.

*Extracts from speeches made by advocates of the adoption of the Federal Constitution in various State Conventions, and the action of some of the Conventions respecting Amendments, as reported in Elliot's Debates.*

Mr. Marshall, in the Virginia Convention, *Elliot's Debates*, III., 553:

"Has the government of the United States power to make laws on every subject?  
\* \* \* Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."

Mr. Pendleton, replying to some of the arguments of Patrick Henry, *Ib.*, 39, 301:

"But it is represented to be a consolidated government, annihilating that of the states—a consolidated government, which so extensive a territory as the United States cannot admit of, without terminating in despotism. If this be such a government, I will confess, with my worthy friend, that it is inadmissible over such a territory as this country. Let us consider whether it be such a government or not. I should understand a consolidated government to be that which should have the sole and exclusive power, legislative, executive and judicial, without any limitation. Is this such a government?"

Or can it be changed to such a one? It only extends to the general purposes of the Union. It does not intermeddle with the local, particular affairs of the states. Can Congress legislate for the state of Virginia?"

"The two governments act in different manners, and for different purposes—the general government in great national concerns, in which we are interested in common with other members of the Union; the state legislature in our more local concerns. Is it true, or merely imaginary, that the state legislatures will be confined to the care of bridges and roads? I think that they are still possessed of the highest powers. Our dearest rights—life, liberty, and property—as Virginians, are still in the hands of our state legislature. If they prove too feeble to protect us, we resort to the aid of the general government for security. The true distinction is, that the two governments are established for different purposes, and act on different objects; so that, notwithstanding what the worthy gentleman said, I believe I am still correct, and insist that, if each power is confined within its proper bounds, and to its proper objects, an interference can never happen. Being for two different purposes, as long as they are limited to the different objects, they can no more clash than two parallel lines can meet."

Mr. Randolph, *Ib.*, 464:

"Let me say that, in my opinion, the adversaries of the Constitution wander equally from the true meaning. If it would not fatigue the house too far, I would go back to

the question of reserved rights. The gentleman supposes that complete and unlimited legislation is vested in the Congress of the United States. This supposition is founded on false reasoning. What is the present situation of this state? She has possession of all rights of sovereignty, except those given to the Confederation. She *must* delegate powers to the confederate government. It is necessary for her public happiness. Her weakness compels her to confederate with the twelve other governments. She trusts certain powers to the general government, in order to support, protect, and defend the Union. Now, is there not a demonstrable difference between the principle of the state government and of the general government? There is not a word said, in the state government, of the powers given to it, because they are general. But in the general Constitution, its powers are enumerated. Is it not, then, fairly deducible, that it has no power but what is expressly given it?—for if its powers were to be general, an enumeration would be needless.

“But the insertion of the negative *restrictions* has given cause of triumph, it seems, to gentlemen. They suppose that it demonstrates that Congress are to have powers by implication. I will met them on that ground. I persuade myself that every exception here mentioned is an exception, not from general powers, but from the particular powers therein vested.”

Mr. Corbin, *Ib.*, Vol. III., 107:

“The powers of the general government are only of a general nature, and their object

is to protect, defend, and strengthen the United States; but the internal administration of government is left to the state legislatures, who exclusively retain such powers as will give the states the advantages of small republics, without the danger commonly attendant on the weakness of such governments."

Madison, *Ib.*, 619, 620:

"I have revolved this question in my mind with as much serious attention, and called to my aid as much information, as I could, yet I can see no reason for the apprehensions of gentlemen; but I think that the most happy effects for this country would result from adoption, and if Virginia will agree to ratify this system, I shall look upon it as one of the most fortunate events that ever happened for human nature. I cannot, therefore, without the most excruciating apprehensions, see a possibility of losing its blessings. It gives me infinite pain to reflect that all the earnest endeavors of the warmest friends of their country to introduce a system promotive of our happiness, may be blasted by a rejection, for which I think, with my honorable friend, that previous amendments are but another name. The gentlemen in opposition seem to insist on those amendments, as if they were all necessary for the liberty and happiness of the people. Were I to hazard an opinion on the subject, I would declare it infinitely more safe, in its present form, than it would be after introducing into it that long train of alterations which they call amendments.

"With respect to the proposition of the honorable gentleman to my left (Mr. Wythe),

gentlemen apprehend that, by enumerating three rights, it implied there were no more. The observations made by a gentleman lately up on that subject, correspond precisely with my opinion. That resolution declares that the powers granted by the proposed Constitution are the gift of the people, and may be resumed by them when perverted to their oppression, and every power not granted thereby remains with the people, and at their will. It adds, likewise, that no right, of any denomination, can be cancelled, abridged, restrained, or modified, by the general government, or any of its officers, except in those instances in which power is given by the Constitution for those purposes. There cannot be a more positive and unequivocal declaration of the principle of the adoption that everything not granted is reserved. This is obviously and self-evidently the case, without the declaration. Can the general government exercise any power not delegated? If an enumeration be made of our rights, will it not be implied that every thing omitted is given to the general government? Has not the honorable gentleman himself admitted that an imperfect enumeration is dangerous? Does the Constitution say that they shall not alter the law of descents, or do those things which would subvert the whole system of the state laws? If it did, what was not excepted would be granted. Does it follow, from the omission of such restrictions, that they can exercise powers not delegated? The reverse of the proposition holds. The delegation alone warrants the exercise of any power."



Mr. Hamilton, in maintaining that the civil and domestic concerns of the people are to be regulated by the laws of the several States, *Ib.*, II, 353, 355, 362:

"If the state governments were to be abolished, the question would wear a different face; but this idea is inadmissible. They are absolutely necessary to the system. Their existence must form a leading principle in the most perfect constitution we could form.

"I insist that it never can be the interest or desire of the national legislature to destroy the *state governments*. It can derive no advantage from such an event; but, on the contrary, would lose an indispensable support, a necessary aid in executing the laws, and conveying the influence of government to the doors of the people. The Union is dependent on the will of the state governments for its chief magistrate, and for its Senate. The blow aimed at the members must give a fatal wound to the head; and the destruction of the states must be at once a political suicide. Can the national government be guilty of this madness?" (353.)

"The states can never lose their powers till the whole people of America are robbed of their liberties. These must go together; they must support each other, or meet one common fate." (355.)

"With regard to the *jurisdiction* of the two governments, I shall certainly admit that the Constitution ought to be so formed as not to prevent the states from providing for their own existence; and I maintain that it is so formed, and that their power of providing for themselves is sufficiently established." (355.)

"I maintain that the word *supreme* imports no more than this—that the Constitution, and laws made in pursuance thereof, cannot be controlled or defeated by any other law. The acts of the United States, therefore, will be absolutely obligatory as to all the proper objects and powers of the general government. The states, as well as individuals, are bound by these laws; but the laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding. In the same manner the states have certain independent powers, in which their laws are supreme."

Chancellor Livingston, in the New York Convention, *Ib.*, 385 :

"Sir, we are attempting to build one government out of thirteen; preserving, however, the states, as parts of the system, for local purposes, and to give it support and beauty. The truth is, the states, and the United States, have distinct objects. They are both supreme. As to national objects, the latter is supreme; as to internal and domestic objects, the former."

In the Massachusetts Convention, Mr. Fisher Ames used this language, *Ib.*, II., 46 :

"Too much provision cannot be made against a consolidation. The state governments represent the wishes, and feelings, and local interests, of the people. They are the safeguard and ornament of the Constitution; they will protract the period of our liberties; they will afford a shelter against the abuse of power, and will be the natural avengers of our violated rights."

Mr. Davie, in the North Carolina Convention, *Ib.*, IV., 58, 160:

"If there were any seeds in this Constitution which might, one day, produce a consolidation, it would, sir, with me, be an insuperable objection, I am so perfectly convinced that so extensive a country as this can never be managed by one consolidated government." (58.)

"The learned gentleman has said that, by a concurrent jurisdiction, the laws of the United States must necessarily clash with the laws of the individual states, in consequence of which the laws of the states will be obstructed, and the state governments absorbed. This cannot be the case. There is not one instance of a power given to the United States, whereby the internal policy or administration of the states is affected." (160.)

Mr. Iredell, in the North Carolina Convention, *Ib.*, IV., 220:

"The powers of the government are particularly enumerated and defined; they can claim no others but such as are so enumerated. In my opinion, they are excluded as much from the exercise of any other authority as they could be by the strongest negative clause that could be framed."

Governor Johnston, in the North Carolina Convention, *Ib.*, 188:

"I do not know a word in the English language so good as the word *pursuance*, to express the idea meant and intended by the

Constitution. Can anyone understand the sentence any other way than this? When Congress makes a law in virtue of their constitutional authority, it will be an actual law. I do not know a more expressive or a better way of representing the idea by words. Every law consistent with the Constitution will have been made in pursuance of the powers granted by it. Every usurpation or law repugnant to it cannot have been made in pursuance of its powers. The latter will be nugatory and void."

Roger Sherman and Oliver Ellsworth in their letter to Governor Huntington, of Connecticut, transmitting a copy of the Constitution, wrote as follows, *Ib.*, Vol. I., 492:

"Some additional powers are vested in Congress, which was a principal object that the states had in view in appointing the Convention. These powers extend only to matters respecting the common interests of the Union, and are specially defined, so that the particular states retain their sovereignty in all other matters."

"The Convention endeavored to provide for the energy of government on the one hand, and suitable checks on the other hand, to secure the rights of the particular states, and the liberties and properties of the citizens. We wish it may meet the approbation of the several states, and be a means of securing their rights, and lengthening out their tranquillity."

Mr. Charles Pinckney, in the South Carolina Convention, *Elliot's Debates*, IV., 259 and 262:

"The distinction which has been taken between the nature of a federal and state government appeared to be conclusive—that in the former, no powers could be executed, or assumed, but such as were expressly delegated: that in the latter, the indefinite power was given to the government, except on points that were by express compact reserved to the people." (260.)

"It had been an opinion long established, that a republican form of government suited only the affairs of a small state; which opinion is founded in the consideration, that unless the people in every district of the empire be admitted to a share in the national representation, the government is not as to them a republic; that in a democratic constitution, the mechanism is too complicated, the motions too slow, for the operations of a great empire, whose defense and government require execution and despatch in proportion to the magnitude, extent, and variety of its concerns. There was, no doubt, weight in these reasons; but much of the objection, he thought, would be done away by the continuance of a federal republic, which, distributing the country into districts, or states, of a commodious extent, and leaving to each state its internal legislation, reserves unto a superintending government the adjustment of their general claims, the complete direction of the common force and treasure of the empire. To what limits such a republic might extend, or how far it is capable of uniting the liberty of a small commonwealth with the safety of a peaceful empire; or, whether, among co-ordinate powers, dissensions and jealousies would not arise, which, for want of a common superior, might proceed to fatal extremities—

are questions upon which he did not recollect the example of any nation to authorize us to decide, because the experiment has never been yet fairly made. We are now about to make it upon an extensive scale, and under circumstances so promising, that he considered it the fairest experiment that had been ever made in favor of human nature." (262.)

General Charles Cotesworth Pinckney, *Ib.*, 315:

"The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press. That invaluable blessing, which deserves all the encomiums the gentleman has justly bestowed upon it, is secured by all our state constitutions; and to have mentioned it in our general Constitution would perhaps furnish an argument, hereafter, that the general government had a right to exercise powers not expressly delegated to it. For the same reasons, we had no bill of rights inserted in our Constitution; for, as we might perhaps have omitted the enumeration of some of our rights, it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated; but by delegating express powers, we certainly reserve to ourselves every power and right not mentioned in the Constitution."

Mr. George Nicholas, *Ib.*, III., 246, 451:

"It is a principle universally agreed upon, that all powers not given are retained. Where, by the Constitution, the general government has general powers for any purpose,

its powers are absolute. Where it has powers with some exceptions, they are absolute only as to those exceptions. In either case, the people retain what is not conferred on the general government, as it is by their positive grant that it has any of its powers." (246.)

"A bill of rights is only an acknowledgment of the pre-existing claim to rights in the people. They belong to us as much as if they had been inserted in the Constitution. But it is said that, if it be doubtful, the possibility of dispute ought to be precluded. Admitting it was proper for the Convention to have inserted a bill of rights, it is not proper here to propose it as the condition of our accession to the Union. Would you reject this government for its omission, dissolve the Union, and bring miseries on yourselves and your posterity? I hope the gentleman does not oppose it on this ground solely. Is there another reason? He said that it is not only the general wish of this state, but all the states, to have a bill of rights. If it be so, where is the difficulty of having this done by way of subsequent amendment? We shall find the other states willing to accord with their own favorite wish. The gentleman last up (Mr. Grayson) says that the power of legislation includes everything. A general power of legislation does. But this is a special power of legislation. Therefore, it does not contain that plenitude of power which he imagines. They cannot legislate in any case but those particularly enumerated. No gentleman, who is a friend to the government, ought to withhold his assent from it for this reason." (451.)

The Massachusetts Convention, in ratifying the Constitution, recommended, *Ib.*, I., 322:

"That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised."

The same recommendation was made by New Hampshire, *Ib.*, 326.

The South Carolina Convention used this language, *Ib.*, 325:

"This Convention doth also declare, that no section or paragraph of the said Constitution warrants a construction that the states do not retain every power not expressly relinquished by them, and vested in the general government of the Union."

The Virginia Convention, in adopting the Constitution, made this declaration, *Ib.*, Vol. III., 656:

"We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, have fully and freely investigated and discussed the proceedings of the federal Convention, and being prepared, as well as the most mature deliberation hath enabled us, to decide thereon, Do, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them whensoever the same shall be perverted to their injury or oppression, and that every power, *not granted thereby, remains with them, and at their*



*will*; that, therefore, no right, of any denomination, can be cancelled, abridged, restrained, or modified, by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes."

The New York Convention likewise declared, *Ib.*, Vol. I, 327:

"That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness; that every power, jurisdiction, and right which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same; and that those clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed, either as exceptions to certain specified powers, or as inserted merely for greater caution."

Although the North Carolina Convention failed to adopt the Constitution, there was an unanimous agreement among the delegates in favor of an amendment declaring that the States retained all the powers which were not granted by the Constitution. *Ib.*, Vol. IV., 244, 249.

Rhode Island, in adopting the Constitution, May 29, 1790, made a declaration similar to that of the

New York Convention, and suggested a number of amendments, the first of which was as follows:

"I. The United States shall guaranty to each state its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Constitution expressly delegated to the United States."

Finally, Congress at its first session, adopted a resolution reciting that:

"The Conventions in a number of the states have, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution;"

and proposed, among others, the following amendment, which duly became the Tenth Amendment to the Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

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